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"No Traitor has been Hung":

The United States of America v. Jefferson Davis 1865-1869

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“No Traitor has been Hung”:
The United States of America v. Jefferson Davis 1865-1869

by

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Dedication

To my mother, Ruth Ann Icenhauer, and in memory of my father, Zaragoza Ramirez.

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“No Traitor has been Hung”:
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The treason charge brought against Jefferson Davis after the American Civil War has been largely ignored by historians. This dissertation examines the imprisonment of the ex-Confederate President, his indictment for treason, and the reasons why the case was never taken to trial.

The beginning of this story is straightforward. By May 1865, Jefferson Davis was implicated in the assassination of Abraham Lincoln and considered an arch-traitor to the country that had educated him and in which he had risen to political prominence. He was also accused of abusing federal prisoners at Andersonville. At that time, both Northerners and Southerners believed that he might be hanged for these crimes. In the ensuing four years, he was imprisoned, indicted, and his case set for trial

many times. However, he was never tried. Ultimately, in 1869, the federal government simply dismissed the case against him. How was it, then, that the political face of the Confederacy escaped a hangman's noose?

Over the last 150 years, this dismissal has primarily been viewed as a political decision. That perception began immediately after his case was dismissed. Northerners regarded it as an example of their magnanimity after having utterly defeated the South. Conversely, white Southerners pointed to the failure to try Davis as proof that he had not committed treason. Their argument went further. If he had not committed treason, then secession had not been unconstitutional.

Both of these arguments are consistent with the politics at that time. As Northerners claimed, the federal government was unquestionably generous in victory in many respects. Similarly, as Southerners claimed, a trial of Davis had the potential to reopen the constitutionality of secession. Davis's defense team was expected to argue that Davis had not violated his loyalty to the United States of America when Mississippi seceded and he followed it out of the Union. The argument made by former Confederates and their supporters was that the dismissal came as a result of fear by Northerners of litigating the

constitutionality of secession. By the end of the war, Southerners

conceded that secession had been determined to be illegal in a trial by battle. They continued to argue, however, that putting the issue before a court of law might result in the Supreme Court overturning the result of the war.

Although both of these justifications are consistent with these political views, there is little factual backing behind either theory. If federal officials had been able to push the case to trial shortly after the war, they certainly would have done so. And, it was unrealistic to believe that an acquittal by a jury, from Richmond, Virginia, no less, would have caused an uncertainty to develop around the question of a State's right to secede. Instead the evidence will show that the criminal case evolved through the years in a way that led to its ultimate dismissal.

In the United States of America v. Jefferson Davis, both parties were represented by preeminent lawyers – Charles O'Conor for Davis and William Evarts for the United States. However, the attorney responsible for putting the case together for the prosecution was Lucius H. Chandler, the local United States Attorney for the Eastern District of Virginia. Chandler did not have the skill or temperament necessary to put the case on a footing that would lead to trial. Getting Davis to a jury was also exacerbated by the involvement of the Chief Justice of the Supreme Court, Salmon P. Chase, who was to be one of the two trial judges had the case

proceeded to trial. Chase made every effort to ensure that he did not have to preside over this divisive and controversial case. In 1868, the impeachment of Andrew Johnson and the presidential election also slowed the momentum of the case. On Christmas Day 1868 President Johnson granted a blanket amnesty to those who participated in the rebellion. All that was left was for the prosecution to formally enter a dismissal in the case. This dissertation will explain how, and why, that happened.

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Introduction

Robert E. Lee and Jefferson Davis suffered very different fates at the end of the Civil War. General Lee, the exhausted and beaten warrior, was beloved by the men of the Army of Northern Virginia and respected by the Union Army troops after he surrendered to Ulysses S. Grant at Appomattox. Under the terms of the surrender Lee agreed to not take up arms against the Union again and he was paroled.[1] He retired to a private home in Richmond where he rested and only occasionally allowed a visitor to interrupt his solitude. Jefferson Davis, on the other hand, under suspicion for complicity in the assassination of Abraham Lincoln and on the run from Union authorities, received much different treatment. He was captured, shackled and imprisoned at Fort Monroe, about eighty miles southeast of the Confederate capitol. He languished there for months, the despised and ridiculed former president of the Confederacy. Friends and family of Jefferson Davis found the treatment meted out to him by his Union captors to be intentionally demeaning and purposefully cruel, especially when contrasted with the Union soldier posted in front of Lee's home to guard his privacy against intruders. In one respect, however, Lee and Davis shared a common fate. Both men were indicted for treason after the war. The charge was a capital crime punishable in the severest cases by death.

[1] Parole of General Robert E. Lee and Staff, endorsed by George H. Sharpe, Assistant Provost-Marshal-General, *War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, 128 vols. (Washington: Government Printing Office, 1880-1901), ser. 97:667 [set hereafter cited as *OR*].

Neither man could have been surprised at these indictments. Together, Lee and Davis had been the faces of the rebellion against the Union. Davis, as political leader of the Confederate States of America, led eleven breakaway states through four years of war against the North - a war of unparalleled violence in American history. After Davis accepted the Confederate presidency, it was under his leadership that a government formed which opposed the United States in war. Lee, the South's military chieftain, was the most respected general officer of the Confederacy. From the time he replaced General Joseph E. Johnston in 1862 at the Seven Days Battles, a savage campaign during which he hurled back George B. McClellan's Army of the Potomac outside of Richmond, until he surrendered his surrounded and dwindling force in 1865, he led the highly successful and greatly feared Army of Northern Virginia against the Union Army. Combining their civilian and military roles, Davis and Lee directed a war against their former government that resulted in over six hundred thousand deaths, and cost millions upon millions of dollars while devastating the South. Their actions in waging war against the American government appeared to be the very definition of the crime of treason as it is set out in the Constitution.

Christopher Phillips in his recent article "Lincoln's Grasp of War: Hard War and the Politics of Neutrality and Slavery in the Western Border States, 1861-1862," has found evidence that supports the argument that Northerners, through Union military personnel, had, during the war, a "collective belief in the coercive authority of a democratically elected government to discipline and punish disloyal citizens alongside

enemy combatants."[2] The sovereignty of the Union had been reestablished only after a long and bloody civil war had beaten the South into submission. The democratically elected federal government that the South had broken from found itself in a position to dramatically demonstrate for posterity that the obligation of loyalty that a citizen had to the country could not be abrogated without consequence. The trial of Lee and Davis would bring that concept into sharp focus. Their conviction and punishment might assure that no other generation of Americans would have to undergo the horrors of a bloody civil war. Yet they were not tried.

This dissertation examines the questions that bear directly on the controversy surrounding the decision not to put either Davis or Lee to trial for treason. Douglas Southall Freeman wrote in 1908 that "published material on the [Jefferson] Davis trial is not abundant."[3] Nothing has happened in the following century that would alter the accuracy of his statement. Cynthia Nicoletti, who now stands as one of the preeminent voices on the Jefferson Davis case, wrote in 2010 that "work on Jefferson Davis' case and its connection to the vindication of secession after the Civil War has been quite minimal."[4] Her work on Davis and secession fills one void in the historiography, but a complete history of the Jefferson Davis case has never been written.

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[2] Christopher Phillips, "Lincoln's Grasp of War: Hard War and the Politics of Neutrality and Slavery in the Western Border States, 1861-1862," *The Journal of the Civil War Era*, 3, No. 2, (2013), 185.

[3] Douglas Southall Freeman, *A Calendar of Confederate Papers*, (Richmond: The Confederate Museum, 1908), 439, fn. 509.

[4] Cynthia Nicoletti, "Did Secession Really Die at Appomattox?: The Strange Case of U.S. v. Jefferson Davis, *University of Toledo Law Review* 41 (2010) 588.

The politics of reconstruction were divided very neatly by Lincoln's murder. As H. W. Brands has written, "had Lincoln lived, the war's end would have forced him to answer questions he had avoided amid the fighting."[5] One of those questions revolved around what ought to be done with the Confederate leadership, both military leaders and political. Lincoln never expressed the sentiments that Andrew Johnson made manifest about the issue. Lincoln was far too politically astute to place himself in a political corner by asserting that "treason should be made odious," as Andrew Johnson had often said. Lincoln was trying to win a war. Making statements like that, if they had any effect on the conduct of the war, would likely extend the fighting by the rebels. No leader would willingly surrender to a government that he knew would hang him for his participation in the war. And even if Lincoln believed that pronouncements like that would not extend the fighting, he would not have wanted to muddy the post-war waters by restricting his ability to make decisions about rebel leadership at a time when the issue was truly ripe. And at the root of the question was whether Lincoln believed that these men should be hanged.

The decision not to prosecute Lee involved facts and motivations much easier to explain than did the failure to bring Jefferson Davis to trial. Lee escaped trial because of the parole given him by Lt. General Ulysses S. Grant at Appomattox. The immense prestige wielded by Grant after the war proved assurance enough that Lee would not be brought to trial even after he was indicted for treason by a federal grand jury in Virginia.

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[5] H. W. Brands, *The Man Who Saved the Union: Ulysses Grant in War and Peace* (New York: Doubleday, 2012), 381.

He was never arrested or jailed on the charge. The language of the parole proved enough of a legal hurdle against prosecution that a case was never brought to bar. Much of the Confederate military leadership found the same consolation. Not so, however, for Davis. He went right to the very brink of trial several times. Andrew Johnson believed that Davis should be tried and punished for treason. His will never wavered but he was guided by the counsel of the attorneys in the case and deferred to their expertise.

The nuances of the law of treason, in some aspects, helped shape the criminal prosecution of Davis, but his fate did not hinge on the state of the law in the 1860s. For that reason, there is no need to undertake a study of the development of the law of treason in the United States. That is not to say that the Davis case did not involve thorny legal issues. There were several areas of law that challenged prosecutors and bore directly on the Davis prosecution. The law on venue was the one area that significantly affected the government's prosecution. That legal question revolved around whether Davis could be tried in a state other than Virginia under the theory of constructive presence. If the law permitted the concept of constructive presence in a treason trial, then he could be tried in Pennsylvania and other Northern states because his armies had invaded those areas pursuant to his orders as commander in chief of the Confederate forces. In other words, if the law of treason permitted the legal fiction that he was present, despite his not actually accompanying the army, then Davis might be tried in any Northern state where a Confederate incursion was made during the war. The importance of how this issue was resolved is evident in that federal prosecutors would be much more likely to secure a conviction if the case was tried in a favorable location.

Trying Davis in a State that was formerly in rebellion made jury selection a much more difficult task. Even if a loyal jury could be seated, the intimidation of members of the jury would be a real threat.

Attorney General James Speed decided early on that constructive presence was not permitted in a treason trial. This seemingly ended the role that this legal issue played in the case. However, the question was revived under Attorney General Henry Stanbery. Stanbery disagreed with his predecessor and believed that as Commander-in-Chief of the rebel army that Davis was in constructive presence wherever, for instance, the Army of Northern Virginia moved. This theory, as applied in this treason prosecution, might establish venue in a Northern state in the Davis case. Since the Davis prosecution seemed to be proceeding at a poor pace when Stanbery was made Attorney General, his legal opinion on the issue might have served to seek a prosecution in a northern state. Instead, he chose not to reveal his opinion to anyone associated with the prosecution and only made his opinion public in his testimony before the House Judiciary Committee investigating the President.

Another legal question that arose in July 1868 as the government's prosecution of Davis seemed to be losing steam was whether the newly ratified Fourteenth Amendment to the United States Constitution punished the ex-rebels in a manner that prohibited the criminal prosecution of Davis. Section 3 of the Amendment prohibited any person from holding any military or civilian office in the federal government "who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of

any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof."[6] The final provision of the section gave Congress the power to remove this disability.

Section 3 did not explicitly state that it operated to bar criminal prosecutions arising out of crimes committed during the war. It seemed a stretch to assert that a constitutional provision designed to keep former rebels from returning to federal employment thereby infusing the government with a rebel flavor also did them the favor of removing any potential criminal liability that men like Davis faced. However, the defense team made that argument at the suggestion of Chief Justice Salmon P. Chase. Whether the Amendment was intended to have that effect or not is not a question that is critical to this study. The importance of the argument can be measured only by the effect that it had on the prosecution of the case.

The legality of secession fascinated Southerners in the final decades of the nineteenth century and formed a part of their defense of their actions. For purposes of this study, consideration of the treason indictments in conjunction with whether secession was legal in the mid-nineteenth century is analyzed only insofar as that issue may have influenced a decision not to try Davis. When it played a role in the strategy or tactics taken by the federal government or defense team in relation to the treason indictments, the question will be addressed. The question whether secession was a right maintained by a state or its citizens after the adoption of the Constitution had not been

[6] U. S. Const., amend. XIV, § 3.

clearly answered at the time of the Civil War. The Constitution did not plainly set out the legality of either. It was, of course, the vagaries of the American Constitution which gave it the chance to be ratified. It was vague on many issues that plagued the young nation in the first half of the eighteenth century. Indeed, George B. Forgie has written that the "constitutional law on the subject of slavery was so murky that a search for precedents would yield whatever one sought."[7] The same may be said about the subject of secession.

After the war, it became commonplace for commentators to say that the legality of secession had been decided in a trial by battle. That point is conceded. The American Civil War conclusively marked the end of the assertion that a State could secede from the Union. The real question however is this: did an apprehension on the part of Union leadership that a treason trial with the defense of the legality of secession, or at least the ambiguity of its illegality, contribute to the decision of government leaders not to prosecute the indictments? Ultimately the decision whether to prosecute a potential crime is more than simply whether the law was clear or not. The great question of the American Civil War requires an examination of whether litigating the resolved point contributed to the federal government's failure to bring the Rebel leadership to trial. In spite of the familiar refrain coming from Southerners, there is no evidence to support the proposition that the charge of treason against Davis was

[7] George B. Forgie, *Patricide in the House Divided: A Psychological Interpretation of Lincoln and His Age* (New York: W. W. Norton & Company, 1979), 152.

dismissed because of a fear on the part of Union officials that an acquittal would result in a trial overturning the result gained on the field of battle.

Other motivations and factors that contributed to the decision not to try the rebel leaders will also be examined. Treason trials of Robert E. Lee and Jefferson Davis would have had far-reaching political and legal implications for the actors involved and the newly re-united Union. The evidence indicates that Abraham Lincoln might not have had the ex-rebels indicted for treason. His successor, Andrew Johnson, once the outspoken advocate of putting the Confederate leaders on trial, advocated their indictment but did not bring them to bar. Did his political struggles contribute to this failure? Similarly, Salmon P. Chase continued his long quest for the American presidency even after assuming the duties of Chief Justice of the United States Supreme Court. Were his actions in connection with the Davis prosecution colored by his ambitions for the nation's highest office? Was this an event that was even determined by the President or Chief Justice? Did the lawyers involved in the prosecution play a bigger role than has commonly been conceded? What role did the attorneys for the parties play in the case eventually being dismissed? This dissertation will investigate the remaining record of the argument surrounding the choice to put neither Confederate leader to trial and attempt to explain how it was that a war that was so costly in lives and possessions resulted in neither man being tried.

Finally, Jefferson Davis, Robert E. Lee and James A. Seddon, among others, were indicted in Washington, D. C. by a military prosecutor in the case that ultimately led to the hanging of Henry Wirz for crimes at Andersonville for allowing the systematic

abuse of Union prisoners of war by starvation and exposure that resulted in the deaths of tens of thousands of men. This dissertation will analyze the question of why Davis and Lee were not tried for war crimes. The execution of African-American soldiers and their white officers at Fort Pillow could have formed the foundation for a war crimes indictment after the war. Many Union men believed that the responsibility for these crimes reached all the way to the top of the Confederacy. If Davis, Lee and others could not be tried for treason, why were they not tried for the inhumane treatment of Union prisoners of war? Is there evidence that federal prosecutors considered bringing charges for these crimes?

Historians of Reconstruction have generally not attributed much significance to the failed Davis prosecution. An early standard work on Reconstruction, *Reconstruction and the Constitution,*[8] by John W. Burgess, a political scientist from Columbia University, does not include a word about Jefferson Davis or the treason indictment. William Dunning, in *Reconstruction Political and Economic 1865 - 1877,* found that "though many prominent Confederates were kept in strict confinement, and were treated in some cases with much more rigor and harshness than was necessary, the policy of bringing them to trial and punishment gradually was abandoned. That Mr. Johnson willingly gave up this policy in the case of Jefferson Davis is more than doubtful." According to Dunning, the "political leaders were being made to feel the bad, and expect

[8] John W. Burgess, *Reconstruction and the Constitution 1866-1876,* (New York: Charles Scribner's Sons, 1905).

the worst, consequences of failure in civil war."[9] In *The Confederacy and Reconstruction: Part 2: The Sequel of Appomattox,* by Walter Lynwood Fleming, the Davis trial received no mention. All that Fleming had to say on the subject was that the radicals "wished to uproot a civilization, while [Andrew Johnson] wished to punish individuals."[10] Claude G. Bowers, in *The Tragic Era: The Revolution After Lincoln,* discusses the Davis prosecution only in terms of how Andrew Johnson "appears to have inspired confidence in women" and uses his meeting with Mrs. Clement Clay and their discussion regarding Davis being tried before a military commission to emphasize that point.[11] The trial of Davis was considered to be "one of Johnson's chief problems, because of its reactions in the South as well as in the North,"[12] according to George Fort Milton in his work entitled *The Age of Hate: Andrew Johnson and the Radicals.* Milton offers a significant discussion of the Davis prosecution but entirely from the viewpoint of the political leadership of the nation. His analysis of the Davis trial ends with the release of the ex-Confederate president on bail in 1867. E. Merton Coulter, in his study entitled *The South During Reconstruction 1865-1877,* gave Davis's imprisonment and criminal prosecution two paragraphs, ultimately writing that "his release was brought

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[9] William Archibald Dunning, *The American Nation: A History,* Vol. 22, *Reconstruction Political and Economic 1865-1877,* (New York: Harper & Brothers, 1907), 22-23.

[10] Walter Lynwood Fleming, *The Confederacy and Reconstruction: Part 2: The Sequel of Appomattox,* (New Haven: Yale University Press, 1919), 88.

[11] Claude G. Bowers, *The Tragic Era: The Revolution After Lincoln,* (New York: Houghton Mifflin Company, 1929), 43-44.

[12] George Fort Milton, *The Age of Hate: Andrew Johnson and the Radicals,* (New York: Coward-McCann, 1930), 245.

about by the strangest of the many strange uses to which the Fourteenth Amendment has been put."[13] As this dissertation will show, Davis was not released because of a strange use of the Fourteenth Amendment. Even the eminent historian, Eric Foner in his landmark book entitled *Reconstruction: America's Unfinished Revolution 1863-1877* relegated the post-war prosecutions to near insignificance. Foner makes mention of Johnson's "amazing leniency" and writes that "Jefferson Davis spent two years in federal prison but was never put on trial and lived to his eighty-second year." As for Henry Wirz, Foner writes that "only Henry Wirz, commandant of Andersonville prison camp, paid the ultimate penalty for treason."[14] The only problem with the statement is that Wirz did not pay the ultimate price for treason. The military commission found Wirz guilty of conspiring with Davis and others "who were engaged in armed rebellion against the United States" of "traitorously and in violation of the laws of war, to impair and injure the health and to destroy the lives" of federal prisoners.[15] He was also found guilty of murder. Subsequently, he was hanged for his war crimes. The treason prosecutions undertaken by the federal government after the war have been minimized into complete insignificance.

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[13] E. Merton Coulter, *A History of the South,* Vol. 8, *The South During Reconstruction 1865 - 1877*, (Baton Rouge: Louisiana State University Press, 1947), 176-177.

[14] Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877*, Perennial Classics, (New York: Perennial Classics, 2002), 190.

[15] Findings and Sentence by Lew Wallace, *Executive Documents of the House of Representatives, 40th Cong., 2d sess., Ex. Doc. No. 23, Trial of Henry Wirz,* (Washington, D.C.: 1867), 805-807.

Every criminal indictment has a story behind it. Good criminal lawyers, both prosecutor and defense, know that how the story is told is crucial to the outcome of the case. Just as important is where the story is told. The right audience for the party's argument determines whether the lawyer's pleas fall on receptive or deaf ears. United States Attorneys prosecuting Jefferson Davis in federal court in Richmond feared having ex-Confederates as jurors on the case. The possibility that jurors, otherwise inclined to convict Davis, might face intimidation from former rebels also was a concern to the government. Davis's defense attorneys dreaded having newly freed African-Americans on the jury. Could these men view the evidence fairly towards their client? The lawyers involved in the Jefferson Davis trial fretted over their case as lawyers from every generation have done. And just as true then as now, every case has a shelf life that cannot be overlooked. In high-profile cases, and there was none after the trial of the Lincoln conspirators that generated more public interest than the potential Davis treason trial until the impeachment trial of Andrew Johnson, public acceptance of the trial of an individual is measured by good trial lawyers. The public mood against an accused in a highly publicized case rarely grows hotter with time. The quicker that an accused can be brought to trial by a prosecutor, the more likely that a conviction can be had. Delay is not a prosecutor's friend. So despite the historian's hope that a profound reason exists in explanation of an event, the failure to try Davis for treason has to be considered from all angles, not just those that might fulfill the historian's hopes. No matter what the basis was for the failure of Andrew Johnson's government to bring Davis to trial, the

dismissal of the case had a profound effect on the narrative offered post-war by the South.

After the war, a defiant South rewrote the story of the American Civil War. The myth of the Lost Cause was born. Robert E. Lee became the Marble Man. Jefferson Davis published defenses of his actions up to the time of his death in 1890. The right of secession was defended. That rebel leaders had committed treason was vehemently denied. Speakers at Confederate reunions and other gatherings pointed to the North's failure to prosecute Davis and Lee for treason. Implicit in the Southern argument was the position that the failure to prosecute was an acknowledgement that the Southern leaders had not committed treason. Woven within that argument was the implication that the failure to prosecute was based on an acknowledgment that the South had been within their constitutional rights to act as they did.

Bishop Charles B. Galloway spoke at the University of Mississippi in 1908 in an address that was published with the title "Jefferson Davis: A Judicial Estimate." Claiming to have studied the "fierce controversies that culminated in the war between the States," Galloway assured his Southern audience that "the Southern position was never shaken, and that the overwhelming weight of argument was on the side of John C. Calhoun and Jefferson Davis."[16] Galloway spoke of the Constitutional question of secession being settled not by 'reason based on historical evidence, but *of events and of*

[16] Charles B. Galloway, "Jefferson Davis: A Judicial Estimate," *Bulletin of the University of Mississippi,* 6, Supplement to No. 3, (August 1908), 14.

force.'"[17] Force of arms did decide the question of the legality of secession. And, the question of treason after the Civil War may have hinged on the constitutionality of secession. But, were Davis and Lee not tried for treason because of a fear that a court of law, and ultimately, the United States Supreme Court, would overturn a legal judgment forged in battle or were the reasons more nuanced and complex, or even more simple, than that? This dissertation will attempt to clarify the basis for the decisions, both legal and political, that led to the decision after the bloodiest war in American history to not bring the leaders, especially Jefferson Davis, to trial for treason. It is a story that is worth telling.

[17] Ibid. 16.

I do not know the method of drawing up an indictment against a whole people.[1] – *Edmund Burke*

Chapter 1

A Murder Not Aiding the Rebel Cause

The election of 1864 provided Northerners a referendum on Abraham Lincoln's management of the war. The passionate arguments advanced by both parties reflected the deeply emotional principles that underpinned their differences. The war was not yet won and it was not yet clear that it would be won. The Democrats regretted what they perceived to be Lincoln's war aims. Lincoln's supporters found Democrats to be nearly unfaithful to their country for their proposed views on reconciliation with the South on Southern terms after so much bloodshed. Jefferson Davis, the President of the Confederacy, stood as the symbol of secession, human bondage and treason to many in the North. The Congressional Union Committee, a pro-Republican organization, accused the Democratic Convention of uttering no word of "disapproval of Jefferson Davis" during their Chicago Convention, thereby drawing the link between the treasonous Davis and the only slightly less treasonous Democratic Party Copperheads. "The blood and crimes, the hardships and deprivations, the infringements on personal liberty which we all endure, were not, during the entire setting of the Convention, once charged to the

[1] Edmund Burke, "Speech of Edmund Burke, Esq., on Moving his Resolutions for Conciliation with the Colonies," March 22, 1775, *Longman's English Classics*, edited by George Rice Carpenter, (New York: Longmans Green & Co., 1896), 36.

rebellion or its leaders,"[2] they wrote. According to the pamphlet, speakers at the Democratic Convention made audacious statements that underscored the white-hot temper of the times. S. S. Cox exclaimed from the podium that a judge had been arrested in Missouri because "he happened to say that Jefferson Davis was no greater enemy to the Constitution than Lincoln. He (the speaker) would say it boldly; let them arrest him. [Cheers and cries, "they dare not.']"[3]

The question of whether Davis and other rebel leaders had committed treason in waging the Civil War was not one which the North answered with unanimity. Even after Lincoln's re-election, the fate of Davis, if the war could be won, was not decided. That many Democrats refused to acknowledge that he was a traitor, even after years of intense warfare, underscored the difficulty that might face a prosecutor in attempting to convict Davis of treason. Indeed, Daniel Webster had given expression to a uniquely American doctrine in June 1825 in an address dedicating the work on the Bunker Hill Monument when he said:

> The Battle of Bunker Hill was attended with the most important effects beyond its immediate results as a military engagement. It created at once a state of open, public war. There could now be no longer a question of proceeding against individuals, as guilty of treason or rebellion.[4]

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[2] "The Chicago Copperhead Convention: The Treasonable & Revolutionary Utterances of the Men who Composed It," (Washington, D.C.: Congressional Union Committee, 1864), 1.

[3] Ibid. 7.

[4] Daniel Webster, *The Works of Daniel Webster*, 6 vols. (Boston: Little Brown and Company 1853) 1:68-69.

If a revolt that had levied a regular army and engaged in pitched battle against the government to which the revolting soldiers formerly owed allegiance removed the potential accusation of treason for the soldiers at Bunker Hill, then surely, many thought, the Army of Northern Virginia having fought at Antietam, Gettysburg, and the Wilderness, would shield the Southern leadership from prosecution under Webster's announced doctrine despite the army's utter defeat at Appomattox. Doubtless, had the British won the Revolutionary War, London would not have recognized this doctrine. Most in the North were unpersuaded as well.

But as the presidential election of 1864 approached, Davis' post-war treatment was not the driving force of the election. Instead, voters would determine whether the conduct of the war would be continued under Lincoln or take a dramatic change under George B. McClellan. The defense of Davis by Democrats might make for good campaign fodder for Republicans but how he would be treated if the North prevailed was subsumed in the vastly more important question of who would prosecute the war. Still, the campaign rhetoric of 1864 revealed the fissures that existed in the opinions of Americans towards the Confederate president.

The re-election of Abraham Lincoln appeared to assure that it would be Lincoln who decided whether Davis would stand trial after the war. On Election Day, it also appeared that the prosecution of Davis, if it occurred, would be undertaken by the capable Edwin Bates, Lincoln's attorney general. However, in late November 1864, just after Lincoln's re-election, Bates submitted his resignation. Gideon Welles happened to be at the Executive Mansion while Bates waited outside the President's office. Not knowing

the reason for the meeting, Welles recorded how anxious Bates appeared before the private meeting with the President during which he would offer his resignation.[5] Bates' decision did not come as a surprise to Lincoln who had been told by Bates months before that he intended to resign as soon as Lincoln was re-elected.[6] The Attorney General was certain that the time was ripe for him to leave the Administration. He had longed for retirement for some time and had very competently discharged the duties of his office. Now, the end of the war appeared to be in sight and, with Lincoln's re-election, the nation seemed to have the experienced executive needed to guide it through the process of reconstruction. The time to leave seemed right to Bates.[7]

Lincoln accepted Bates' decision to leave the office of Attorney General. The president had clearly given thought to Bates' successor, because he did not hesitate to approach Joseph Holt, the Judge Advocate General, and offer him the cabinet post. This

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[5] Gideon Welles, *Diary of Gideon Welles*, ed. Edgar T. Welles, 3 vols. (Boston: Houghton Mifflin Company, 1911), 2:181.

[6] Edward Bates, *The Diary of Edward Bates 1859-1866*, ed. Howard K. Beale, (Washington, D.C.: United States Government Printing Office, 1933), 428.

[7] This resignation, coupled with the death of Supreme Court Chief Justice Roger Taney only six weeks earlier, opened two of the nation's most prominent posts for lawyers. Intrigues swirled around Washington as men actively sought the Supreme Court bench or bandied their names about as possible replacements as Attorney General. One of the names that had been brought to Lincoln's attention to fill Taney's vacancy was William M. Evarts of New York. His name was put forward by Gideon Welles, among others, who believed that Evarts "stood among the foremost at the New York bar; perhaps no one was more prominent as a lawyer." Welles recorded Lincoln's assessment of Evarts as being "a good lawyer." However, Evarts would lose out on the job to Lincoln's former Secretary of the Treasury, Salmon P. Chase, but would re-emerge as a top prosecutor on the Jefferson Davis treason indictment. Welles, *Diary*, 2:181.

choice would have surprised few people. Lincoln's cabinet reflected more than simply a person's qualifications for the job. Even before the suggestion was made, Welles wrote in his diary that he thought that the post had to go to a man from a Border State and thought Holt likely to be Lincoln's nominee.[8] Welles viewed the appointment from a political and geographical perspective that characterized Lincoln's course in 1860. But Lincoln was now elected to a second term and with Sherman's capture of Atlanta, the war South nearing defeat, there was no reason to believe that Lincoln was necessarily bound by those geographic considerations that had been so clearly marked in his choices for his first cabinet.

Joseph Holt, who hailed from Kentucky, satisfied Welles's political consideration, but was a good choice for other reasons, as well. He was an accomplished, highly regarded lawyer from a slave state, whose brilliant legal mind and staunch loyalty to the Union made him an easy choice for Attorney General.[9] But according to John Nicolay and John Hay, Lincoln's secretaries, Holt balked at the offer because he believed "that the length of time which had elapsed since he had retired from active service at the bar had rendered him unfit for the preparation and presentation of cases in an adequate manner before the Supreme Court."[10] Holt asked for a few days to consider Lincoln's offer. On November 30, 1864 he wrote to Lincoln to decline the position. It is difficult

[8] Ibid. 2:183.

[9] Elizabeth D. Leonard, *Lincoln's Forgotten Ally: Judge Advocate General Joseph Holt of Kentucky,* (Chapel Hill: The University of North Carolina Press, 2011), 2 - 3.

[10] John G. Nicolay and John Hay, *Abraham Lincoln: A History,* 10 vols. (New York: The Century Company, 1890), 9:346 - 347.

to know whether Holt truly believed that he was not qualified to be the nation's highest law enforcement official or if some other reason formed the basis for him declining the Cabinet post. People oftentimes offer less than candid reasons for declining positions that they do not want in the first place. There is some basis to believe that Holt fell prey to this when he explained his decision. It was no secret that he had faced immense pressure from his family to join the Southern cause immediately before the outbreak of the war, and that his tenacious defense of the Union strained the bonds he had with his closest family members. He knew that if he assumed the job of Attorney General that his office would issue opinions, over his signature, on the legality of the thorny issues surrounding reconstruction. On top of that, the prosecution of Southern leaders for treason, if those trials were to take place, would be directed by the Attorney General. Many people thought that the Attorney General himself should prosecute the rebel leaders. There is no direct evidence that this consideration played a role in his refusal of the office but the reasons advanced by Holt to Lincoln for declining the post simply do not ring true.

His decision to decline Lincoln's offer to take the post of Attorney General was not seen as a major news story by the nation's editors. While the people of the North were reading the exciting accounts of the Battle of Franklin and Major-General George Thomas' defeat of his Confederate counterpart, John Bell Hood, Holt's decision was buried on page four of *The New York Times.* That newspaper found the news insignificant enough to place it two pages after the "List of Letters Unclaimed in the New York Post Office" and just below the one sentence which advised readers that the Army

of the Potomac had "no movements in progress."[11] Holt's rejection of the job removed the possibility that his dynamic, forceful personality would be at the helm of the post charged with the prosecution of Davis and other Confederate leaders. It is difficult to underestimate the difference that a leader like Holt would have brought to the prosecution of Davis.

If Holt actually thought that his legal skills were inadequate for the job, then his recommendation to Lincoln makes little sense because the man he recommended had even less legal experience than Holt. Very shortly after his interview, Holt wrote Lincoln suggesting their mutual friend, James Speed, for the job:

> Referring to our conversation of yesterday, I beg to say that the opinion there expressed in regard to Mr. S. remains unchanged. I can recall no public man in the State, of *uncompromising loyalty*, who unites in the same degree, the qualifications of professional attainments, fervent devotion to the union, & to the principles of your administration & spotless points of personal character. To these, he adds - what I should deem indispensable - a warm & hearty friendship for yourself, personally & officially.[12]

He and Lincoln had discussed James Speed as a potential replacement for Bates. Holt now made his case for Speed in writing. The December 1, 1864 letter allows readers to infer what else they had talked about. First, the issue of geography must have been broached for Holt refers to Speed as foremost "in the State" of Kentucky in certain characteristics. His advancing the name of James Speed gives very little hint that he

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[11] *New York Times*, December 1, 1864.

[12] Joseph Holt to Abraham Lincoln, December 1, 1864, Abraham Lincoln, Roy P. Basler, editor, *The Collected Works of Abraham Lincoln*, ed. Roy P. Basler, 10 vols. (New Brunswick, New Jersey: Rutgers University Press, 1953), 8:127. [set hereafter cited as *Collected Works*].

believed that legal accomplishments should be the primary reason for the offer. Holt emphasized Speed's "uncompromising loyalty," his "fervent devotion to the union" and his "hearty friendship" to Lincoln amongst his greatest qualifications for Attorney General. He fails to mention a single accomplishment by Speed in the legal profession. Almost in passing that he also mentioned Speed's "qualifications of professional attainments."

If Holt was not qualified to be Attorney General, then James Speed, a Kentucky lawyer, must have been woefully unprepared. Still, Speed's legal acumen appears to not have been a motivating factor in the appointment. In fact, it makes sense that Lincoln did not view the office as one that necessarily required a strong legal background in the issues now facing the Administration. Lincoln, himself, was an excellent attorney and understood the legal issues that would confront him in his second term better than any other man. Secondly, there were other excellent lawyers in his cabinet. Edwin Stanton had briefly served James Buchanan as Attorney General. William Seward was a brilliant lawyer. It can be persuasively argued that Lincoln really did not need the advice of another accomplished lawyer in his circle of advisors. Moreover, once Speed was confirmed to the cabinet, Lincoln closely supervised Speed. As Speed later recalled, Andrew Johnson "interfered with my appointments very much less than Mr. Lincoln had done during his lifetime."[13] Lincoln's close monitoring of Speed extended to other issues

[13] Testimony of James Speed, The Judiciary Committee of the House of Representatives, 39th Cong. 2d sess., 40th Cong. 1st sess. *Impeachment Investigation*, (Washington, D.C.: Government Printing Office, 1867) 794.

as well and the president could have expected to make certain that Speed's tenure as Attorney General took the path directed by Lincoln.

What drew Lincoln to appoint James Speed was that he was a friend on whose advice Lincoln could depend to be given honestly and with the good of the country in mind. Speed would not be advancing a personal or political agenda that would deviate from the President's. During the four years of Lincoln's second term, Speed would not need to concern himself with the formulation of legal policy. Instead, he could be relied upon to offer Lincoln sound, honest advice that the president would implicitly understand was not formed from unspoken political ambition. In Lincoln's second term, Speed may have been able to offer the president exactly what he needed as an Attorney General. If Lincoln had lived, Speed's appointment may have proven to be a good choice. There is no doubt but that the question of whether to prosecute rebel leaders after the end of the war would have been decided upon by Lincoln. Any trials would have taken place only with the close scrutiny, advice and supervision that a great trial lawyer, like Lincoln, could have given Speed on the cases. But with the benefit of hindsight and Lincoln's tragic murder, the choice for Attorney General was, indeed, poor. While events that shaped history were still months in the future, Lincoln was anxious to get James Speed on board.

Illustration # 1: James Speed

On December 1, 1864, Lincoln telegraphed Speed a two sentence telegram. "I appoint you to be Attorney General. Please come on at once. A. Lincoln"[14] Speed was thrilled. He admitted to a family member in a letter only four days later that "the call was sudden and unexpected"[15] and, unlike Holt, he did not appear to have seriously considered his inadequacy for the post. He quickly responded to the president's call and traveled to Washington, D.C. directly. On December 5, he met with Lincoln in Washington to discuss the offer. Immensely pleased with the courtesy shown to him by the President, Speed heartily accepted with the caveat that he would not begin work until his nomination had been confirmed by the Senate. Two days later, according to the *Trenton State Gazette*, Speed was admitted to practice before the United States Supreme Court.[16]

Speed's nomination faced no opposition in Congress. Within a week of Lincoln's offer, Speed's name was referred to the Judiciary Committee. The *New York Times* reported that "the committee are understood to be nearly unanimous in his behalf."[17] Indeed, he was quickly at his post. Speed approached the job with determination. At 52, he was a fit, compact, balding man. He wore glasses and sported a full beard and mustache. He was described by the *New-Hampshire Sentinel* as looking "like a man of

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[14] Abraham Lincoln to James Speed, December 1, 1864, *Collected Works*, 8:126.

[15] James Speed, *James Speed: A Personality*, (Louisville, KY: Press of John P. Morton & Co., 1914), 52. The author of this book is the grandson of Attorney General James Speed.

[16] Testimony of James Speed, *Impeachment Investigation*, 794; and *Daily State Gazette*, December 9, 1864.

[17] *New York Times*, December 9, 1864.

ability, great force, sharp opinion and large capacity for hard work."[18] His reputation for physical courage had been cemented in the early days of the secession crisis when he had walked through a room crowded with secessionists, pulled down the rebel flags adorning the meeting room and unfurled two American flags in their place. He then demanded the right to be heard on the issue and delivered a very strongly worded, pro-Union speech that elevated his reputation throughout the North. That he was a staunch Union man could not be doubted. The war's end, however, would bring issues with deep constitutional and legal consequences to Speed's desk. These issues would arrive on his desk along with the thorny question of how to practically and politically address the problems. Among these would be the not so insignificant matter of whether to try Southern leaders for treason and, if so, how to accomplish that task. Rather than the steady supervision of Abraham Lincoln, Andrew Johnson "left the whole department to my management,"[19] Speed later recalled. Unfortunately, he was unprepared to be at the helm of the Office of the Attorney General.

Upon assuming office, however, Speed was lauded by the nation's press for his accomplishments. The *New Orleans Tribune* published an article stating:

> that exquisite judgment of men which has distinguished Mr. Lincoln's selection of his constitutional advisers is again exhibited in the appointment of James Speed, Esq., of Louisville, Ky., to the Attorney Generalship of the United States, vacated by the retirement of Hon. Edward Bates of Missouri. Mr. Speed brings to his high office studious and laborious habits, a perspicuous and analytical mind and a professional

[18] *New-Hampshire Sentinel*, December 29, 1864.
[19] Testimony of James Speed, *Impeachment Investigation,* 794.

> integrity which no breath of slander has ever impeached and which is made more illustrious by an unspotted private character.[20]

But it would take much more than an earnestness and strong work ethic for James Speed to succeed as Attorney General. It did not take him long to realize that he had taken on a mountain of labor and that his ability to flourish would be challenged. Six days after having accepted the job, Speed wrote that "I find the labor of my office will be great; with a watchful eye over my health and habits, I think that I will get through them."[21]

Lincoln's Post-War Plans for Rebel Leadership

Lincoln left historians precious little evidence to discern what he would have ordered done with the leaders of the rebellion. Lincoln's first inaugural address struggled with the nature of the rebellion but it was his position that "acts of violence, within any State or States, against the authority of the United States, are insurrectionary or revolutionary, according to the circumstances."[22] The word "revolutionary" was substituted for the word "treasonable" in the speech, but it was still clear that Lincoln did not view the actions of the Southern leaders as constituting civil war. His perception was based on his belief that the vast majority of Southerners were loyal to the Union. This, in addition to the practical issues that would be raised if the struggle was acknowledged to be a civil war, such as the possibility of international recognition of the Confederacy,

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[20] *New Orleans Tribune*, December 15, 1864.
[21] Speed, *James Speed*, 53.
[22] Abraham Lincoln: First Inaugural Address, March 4, 1861, *Collected Works*, 4:265.

shaped his view. As the war progressed, the Lincoln administration's treatment of the rebellion evolved into a legal policy that John Fabian Witt has labeled "a strange inconsistency."[23] The noted inconsistency existed but was understandable. As the war broadened, the practicalities of war forced these inconsistencies. The Union needed to blockade Southern ports. Prisoner exchanges between rival armies needed to be made. The line between whether the fighting was a rebellion or a war between two separate nations became blurred by the actions that the North took in trying to wage war against the South.

Lincoln believed that Southern leaders were responsible for the war. In September 1862, he told a group of Chicago Christians who presented him with a memorial in favor of national emancipation, "I admit that slavery is the root of the rebellion, or at least its *sine qua non*. The ambition of politicians may have instigated them to act, but they would have been impotent without slavery as their instrument."[24] But it was the politicians who led the South out of the Union. And, Lincoln's view that the Southern leaders had committed treason was clear. His published letter to Erastus Corning and others is often quoted for the memorable question, "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wiley agitator who

[23] John Fabian Witt, *Lincoln's Code: The Laws of War in American History*, (New York: Free Press, 2012), 142.

[24] Abraham Lincoln's Reply to Emancipation Memorial Presented by Chicago Christians of All Denominations, September 13, 1862, *Collected Works*, 5:423.

induces him to desert?"[25] More important to this discussion, in that letter, he also discusses his view of treason and men like Lee. Lincoln was responding to Corning's resolution condemning Lincoln's suspension of the writ of habeas corpus. At issue was the recent arrest of Clement Vallandigham for violating an order issued by General Ambrose Burnside in Ohio for expressing disloyal opinions. Corning's resolution asserted that Lincoln had overstepped his constitutional authority by suspending the writ of habeas corpus in areas not actively in rebellion and that arrests should not be made except upon evidence of a crime having been committed. Lincoln responded as follows:

> The man who stands by and says nothing, when the peril of his government is discussed, can not be misunderstood. If not hindered, he is sure to help the enemy. Much more if he talks ambiguously - talks for his country with 'buts' and 'ifs' and 'ands.' Of how little value the constitutional provision I have quoted will be rendered, if arrests shall never be made until defined crimes shall have been committed, may be illustrated by a few notable examples. Gen. John C. Breckenridge, Gen. Robert E. Lee, Gen. Joseph E. Johnston, Gen. John B. Magruder, Gen. William B. Preston, Gen. Simon B. Buckner, and Comodore [Franklin] Buchanan, now occupying the very highest places in the rebel war service, were all within the power of the government since the rebellion began, and were nearly as well known to be traitors then as now. Unquestionably if we had seized and held them, the insurgent cause would be much weaker. But no one of them had then committed any crime defined in the law. Every one of them if arrested would have been discharged on Habeas Corpus, were the writ allowed to operate.[26]

[25] Ibid. Abraham Lincoln to Erastus Corning and Others, June 12, 1863, 6:266.
[26] Ibid. 6:265.

Historians of the war have backed Lincoln's view. "Without Lee and that famous field command, the Confederate experiment in rebellion almost certainly would have ended much sooner,"[27] is the belief of Gary W. Gallagher.

Lincoln's letter to Corning offers historians a glimpse of his opinion on treason trials when he expressed his view of the difficulty securing convictions in treason trials. "A jury," he said, "too frequently have at least one member, more ready to hang the panel than to hang the traitor."[28] His thought would prove remarkably similar to that of the Davis prosecutors five years later. Lincoln believed Robert E. Lee and Jefferson Davis committed treason; still he was a good enough lawyer to know that securing convictions would prove difficult.

Jay Winik has written about the "remarkable compassion and charity toward the Confederates that was to be the backbone of [Lincoln's] postwar policy."[29] Winik is not alone in this assessment. Many of Lincoln's contemporaries believed that this benevolence would extend even to the rebel leadership. Given Lincoln's extensive experience as a trial lawyer and the opinion expressed to Corning, it would stand to reason that his reluctance to try men like Davis and Lee for treason after the war might stem from his view of the difficulty in securing convictions. This view, in conjunction

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[27] Gary W. Gallagher, "Another Look at the Generalship of R. E. Lee," in *Lee: The Soldier* (Lincoln: University of Nebraska Press, 1996), 286.

[28] Abraham Lincoln to Erastus Corning and Others, June 12, 1863, *Collected Works,* 6:264.

[29] Jay Winik, *April 1865: The Month that Saved America,* (New York: Harper Collins Publishers, 2001), 253.

with his interest in reconciling the two sections of the country, certainly would have influenced his thoughts on trying the Confederate leadership.

The president was also a very practical politician. Days after the debacle at Fredericksburg, Virginia, Lincoln responded to a letter from Fernando Wood, the Democratic congressman from New York, addressing the question of the Confederacy sending representatives to the next Congress to discuss peace. Wood indicated in his letter that the only request that would be made by the Confederacy to send the mission was that "a full and general amnesty should permit them to do so." Lincoln began his response by indicating that he thought Wood's information would "prove to be groundless." But he artfully dodged the question regarding amnesty except to write that if the seceded states wanted to return to their proper place within the Union, that "in such case, the war would cease on the part of the United States, and that, if within a reasonable time, 'a full and general amnesty' were necessary to such end, it would not be withheld."[30] Consequently, it is undoubtedly correct that President Lincoln was open to granting a 'full and general amnesty' even years before the war's end.

On other occasions, Lincoln gave assurances that he was not vindictive. Writing privately on July 26, 1862, to Reverdy Johnson, Democratic Senator from Maryland, he said, "I am a patient man - always willing to forgive on the Christian terms of repentance; and also to give ample *time* for repentance." But forgiveness did not equate with weakness to Lincoln. Responding to Johnson's complaint that pro-Union sentiment was

[30] Abraham Lincoln to Fernando Wood, December 12, 1862, *Collected Works*, 5:553.

being snuffed out in the areas of the South occupied by Union forces because of rough treatment of the civilian population, Lincoln graphically stated his case. "You are ready to say I apply to *friends* what is due only to *enemies.* I distrust the *wisdom* if not the *sincerity* of friends, who would hold my hands while my enemies stab me."[31]

Consequently, the president was perfectly willing for the military to arrest and incarcerate civilians, even members of the judiciary, who worked against the Union war effort. Judge Richard B. Carmichael of Talbot County, Maryland, charged a grand jury that it was their duty to indict persons who had been responsible for arresting secessionists, including several officers of a Delaware regiment. General John A. Dix sent a Deputy Provost Marshal and four policemen to Easton, Maryland to arrest the offending judge, while he was presiding in court, "in order that the proceeding might be more marked." The marshal and two police officers ascended the bench and informed Judge Carmichael that they had an order, by authority of the United States, to take him into custody. The judge angrily denied that the government had the authority to arrest him and reportedly attacked one of the police officers. During the struggle, the judge ("unfortunately," according to the report) received a superficial wound to the head. The officers restrained him and led him from the courtroom under arrest. When Maryland politicians appealed to Lincoln to release Carmichael, the president gave them his thoughts on the matter:

> I have been considering the appeal made by yourself, and Senator Pearce in behalf of Judge Carmichael. His charge to the Grand-Jury, was left with me by the Senator, and, on reading it, I must confess I was not

[31] Ibid. Abraham Lincoln to Reverdy Johnson, July 26, 1862, 5:343.

> very favorably impressed towards the Judge. The object of the charge, I understand, was to procure prosecutions, and punishment of some men for arresting or doing violence to some secessionists - that is, the Judge was trying to help a little, by giving the protection of law to those who were endeavoring to overthrow the Supreme law - trying if he could find a safe place for certain men to stand on the constitution, whilst they should stab it in another place.
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> But possibly I am mistaken.[32]

Ultimately, the president agreed to release the judge if Carmichael took the oath of allegiance. Lincoln did not hesitate to use military justice against civilians during the Civil War. It would not have been unreasonable, based on the wartime evidence, for him to have sought military justice for the Confederate leadership. But the question remains, what did he intend to do with the rebel leadership after the war?

Perhaps the most compelling evidence of Lincoln's thoughts regarding the post-war treatment of Davis was offered by Major-General William Tecumseh Sherman in his *Memoirs.* On March 28, 1865, Sherman, Admiral David Porter and Lt. General Ulysses S. Grant met with President Lincoln aboard the *River Queen,* a steamer lying at wharf at City Point, Virginia. Sherman asked what should be done with political leaders like Davis. Sherman wrote that he asked whether they should be allowed to escape.[33]

Lincoln said that he was not able to speak frankly on the subject, but Sherman said that he intimated, through a story, that Davis should "'escape the country,' only it would not do for him to say so openly. As usual," Sherman continued, "he illustrated his meaning by a story: 'A man had taken the total-abstinence pledge. When visiting a

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[32] Ibid. Abraham Lincoln to John W. Crisfield, June 26, 1862, 5:285.

[33] William Tecumseh Sherman, *Memoirs of General W. T. Sherman,* 2 vols. (New York: D. Appleton & Company, 1875), 2:326.

friend, he was invited to take a drink, but declined, on the score of his pledge; when his friend suggested lemonade, which was accepted. In preparing the lemonade, the friend pointed to the brandy-bottle, and said the lemonade would be more palatable if he were to pour in a little brandy; when his guest said, if he could do so 'unbeknown' to him, he would not object.' From which illustration I inferred that Mr. Lincoln wanted Davis to escape, 'unbeknown' to him."[34]

Sherman was not alone in his view of Lincoln's intentions. James Speed stated that immediately after the collapse of the rebellion "clemency, and not persecution, was, I think, the policy of the government."[35] General Grant also echoed Sherman's belief. Grant wrote that "Mr. Lincoln, I believe, wanted Mr. Davis to escape, because he did not wish to deal with the matter of his punishment. He knew there would be people clamoring for the punishment of the ex-Confederate president, for high treason. He thought blood enough had already been spilled to atone for our wickedness as a nation."[36]

Much of the rest of the nation was not quite so ready to reconcile with the men who had led the nation through this bloody crucible. Only days after the surrender of the Army of Northern Virginia, rumors were reported that Robert E. Lee intended to travel to New York City amid suggestions that he should be treated with dignity and respect. One

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[34] Ibid. 326-327. The *New York Times* on July 4, 1865 also had Sherman's rendition of this meeting. He told the *Times* that Lincoln said, after the story of the temperance lecturer, that "I'm bound to oppose the escape of Jeff. Davis; but if you could manage to let him slip out unbeknownst-like, I guess it wouldn't hurt me much." This version seeks to have the Union army play a slightly more active role by managing "to let him slip out."

[35] Testimony of James Speed, *Impeachment Investigation*, 798.

[36] Ulysses S. Grant, *Personal Memoirs of U. S. Grant*, 2 vols. (New York: Charles L. Webster & Co., 1892), 2:522.

anonymous letter to the editor addressed reconciliation with Confederates. "We have not been pouring out millions of treasure and oceans of blood, parents have not submitted to become childless, wives to become widows, and children to become orphans, and the whole nation to be draped in sorrow, for the poor privilege of honoring a traitor."[37] The writer reminded readers that the stern realities of war compelled an army's execution of deserters; how then, he asks, could honors be bestowed on Lee, who deserted the flag "after he has been *educated by the nation to skill in its defense.* More than that, who fires upon the flag that has given him the position and honor that he once enjoyed and shoots down in thousands those who, not base and traitorous like himself, rather die than desert. Such is Gen. Robert E. Lee." The writer closed with what must have been the hopes of many in the North - let the "government seize him, try him and execute him as a traitor."[38] This was the sentiment of many before Lincoln's assassination. Any hope for clemency rather than persecution might be quieted by those who believed punishment was in order. The howls for rebel blood would come to new heights after his murder.

Lee's Surrender and the Significance of Grant's Terms

When Lee and Grant met at Appomattox in April 1865 for Lee to surrender his army, the Army of Northern Virginia was on the verge of complete destruction. Exhausted and surrounded, Lee's command, once the envy of the entire continent, was at

[37] *Hartford Daily Courant*, April 14, 1865.
[38] Ibid.

the mercy of the Army of the Potomac and its leader, Ulysses S. Grant. The two men discussed the terms of surrender on April 9th. The terms that Grant set were decidedly magnanimous to the Confederate soldiers despite their utter inability to continue the fight against the vastly superior Union forces. However, the surrender agreement represented much more than simply the laying down of arms by a defeated army; it also became a critical document in Lee's later fight against the charge of treason.

Grant had twice previously accepted the surrender of large Confederate forces. On February 16, 1862, he had famously demanded the unconditional surrender of Fort Donelson despite Confederate General Simon Buckner's request to discuss terms for the surrender of the Southern fort. The nearly 15,000 Confederate troops capitulated to the demand, although Grant then proved more generous than his demand of "unconditional surrender" appeared. There was no formal surrender ceremony and Southern officers were permitted to keep their side-arms and personal baggage. Later, on July 4, 1863, Grant accepted the surrender of Vicksburg after the city had been besieged for six weeks. Initially, on July 3, Grant had indicated that he would accept only an unconditional surrender of the 30,000 men led by Lt. Gen. John C. Pemberton. But recognizing the difficulties involved in an assault of the city and the bloodshed that would result, Grant met with his corps and division commanders and had a change of heart. He wrote Pemberton that the Confederates would be paroled to their homes rather than being sent to prison camps if they surrendered rather than force an attack by the Union army. Additionally, officers would be permitted to keep their side arms, personal belongings and one horse. The Union commander also agreed to distribute rations to the surrendered

troops. When Pemberton received this offer, he quickly accepted. Joan Waugh has written that "at both Fort Donelson and Vicksburg, Grant combined devastating military victories with sensible and even sensitive surrender policies, pointing toward reunion of the two warring countries."[39]

Grant certainly had a clear view of what his terms would be with Lee by the time he sat down to write them out, even though he did not have any prepared text for the surrender. Rejecting ceremony, Grant laid down very simple terms for the surrender. Again, individual soldiers were given their parole. The arms and artillery, he ordered to be parked and stacked. As to the leaders of the Army of Northern Virginia, Grant ordered simply that the officers were "to give their individual paroles not to take up arms against the Government of the United States." After providing for the property of the Southern army, Grant wrote that "this done, each officer and man will be allowed to return to his home, not to be disturbed by U. S. authority so long as they observe their paroles and the laws in force where they may reside."[40]

While at Appomattox Court House, Lee and his staff signed a parole letter themselves on April 9, 1865. It stated that:

> We, the undersigned prisoners of war belonging to the Army of Northern Virginia, having been this day surrendered by General Robert E. Lee, C. S. Army, commanding said army, to Lieut. Gen. U. S. Grant, commanding the Armies of the United States, do hereby give our solemn parole of

[39] Joan Waugh, "'I Only Knew What Was in My Mind,' Ulysses S. Grant and the Meaning of Appomattox," *The Journal of the Civil War Era,* 2, no. 3 (2012), 317. Waugh's fascinating interpretation of Grant's evolving view of surrender during the American Civil War forms the basis for this section on *Lee's Surrender.*

[40] Ulysses S. Grant to Robert E. Lee, April 9, 1865, *O. R.*, ser. 95:58.

> honor that we will not hereafter serve in the armies of the Confederate States, or in any military capacity whatever, against the United States of America, or render aid to the enemies of the latter, until properly exchanged, in such manner as shall be mutually approved by the respective authorities.[41]

Strengthening the argument that this parole letter carried the sanction of law was the endorsement made by George H. Sharpe, Assistant Provost-Marshal-General. He wrote immediately beneath the parole that "the within named officers will not be disturbed by the United States authorities so long as they observe their parole and the laws in force where they may reside."[42] The affirmation by Sharpe made no legal limitation in the statement that these men, including the commanding general of the Army of Northern Virginia, were not to be disturbed by United States authorities so long as they did not take up arms again against the United States or prospectively violate the laws in effect where they chose to reside.

Waugh interprets Grant's terms to Lee as a product of his evolving view of the war and its aftermath as well as his conversations with Lincoln at City Point. The terms appear to have been brilliantly thought through. Whether they were "only what Grant knew were in his head," the conditions of Lee's parole at Appomattox would now form the basis for Lee's defense to the charge of treason. He would argue, if necessary, that a charge of treason against him was legally barred by the terms of his parole. Given Sherman and Grant's talks with the president, Lincoln's fingerprints may as well be on the surrender papers. An attorney as fine as Lincoln could not have failed to notice that

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[41] Ibid. Parole of General Robert E. Lee and Staff, endorsed by George H. Sharpe, Assistant Provost-Marshal-General, ser. 97:667.
[42] Ibid.

Lee's parole barred any prosecution of him. The only reasonable interpretation is that Grant's terms were in full accordance with the wishes of Lincoln. If this explanation is correct, then Lincoln's vision of the post-war centered on reconciliation rather than retribution against the Southern leadership.

Grant and Lincoln spent many days together at City Point preceding the collapse of Lee's army in late March and early April 1865. Their relationship was clearly an intimate one. On March 20, 1865, Grant wrote the president asking: "Can you not visit City Point for a day or two? I would like very much to see you, and I think the rest would do you good."[43] Lincoln responded enthusiastically to the invitation.[44] Since we know the topic of what to do with the rebels after the war was discussed on the *River Queen* earlier in the year, it makes sense that it continued to occupy their thoughts as the end approached. While at City Point, Lincoln and Grant would have certainly spoken of the disposition that would be made of Lee's troops after the war. On April 6, Lincoln was still at City Point and writing to Grant in the field. He spoke of the administration policy "which you remember" regarding confiscation of rebel property, indicating "that confiscations shall be remitted to the people of any State which will now, promptly and in good faith, withdraw its troops and other support from resistance to the Government." In the same missive, Lincoln wrote of allowing the Virginia legislature to meet if they

[43] Ibid. Grant to Lincoln, March 20, 1865, 97:50.
[44] Ibid. Lincoln to Grant, March 20, 1865, 97:50.

indicated that they would consider this proposition. Lincoln told Grant that "I have thought best to notify you so that if you should see signs you many understand them."[45]

The two leaders collaborated so closely on the political issues surrounding surrender that Lincoln thought best to let Grant know about the prospect for confiscations being returned to citizens if their states gave up the fight. Certainly the evidence strongly supports the idea that the president and Grant had discussed the possible terms to be offered if Lee surrendered. Given the written evidence, it is only reasonable that Lincoln was well aware of the generous terms that Grant would put forward to Lee to end the war. The bar to prosecution that Grant included at Appomattox had every indication that it bore Lincoln's stamp of approval.

John Minor Botts of Virginia said that "at the time of the surrender of General Lee's army and the restoration of peace I think there was, not only a general, but an almost universal acquiescence and congratulation among the people that the war had terminated, and a large majority of them were at least contented, if not gratified, that it had terminated by a restoration of the state to the Union. At that time the leaders, too, seemed to have been entirely subdued. They had become satisfied that Mr. Lincoln was a noble, kind-hearted, generous man, from whom they had little to fear."[46]

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[45] Ibid. Lincoln to Grant, April 6, 1865, 97:593.

[46] Testimony of John Minor Botts, *The Journal of the Joint Committee of Fifteen on Reconstruction: 29th Congress, 1865-1867,* ed. Benjamin B. Kendrick, (New York: Columbia University, 1914), 287.

The Assassination of Lincoln

The murder of Abraham Lincoln by John Wilkes Booth on April 14, 1865 sent a shock wave throughout the North. Washington was transformed, literally overnight, from a jubilant capitol to one draped in mourning. Reportedly, groups of men gathered at hotels and street corners angered by the assassination and eager to find rebel sympathizers to punish for the crime. Mob violence against people with Southern leanings became a real threat. Stranded in the District of Columbia because of the ban against anyone leaving the city, Southerners wisely stayed off the streets. Whether through fear of reprisal or genuine sorrow, many of them joined in the public display of mourning. The houses of prominent Rebels displayed crape and funeral decorations, if only to try to shield themselves from the vengeance of the mobs that gathered in the city. Persons seen being transported under guard were threatened in the streets by a rush of angry crowds.[47]

Many in Lincoln's cabinet waited up all night at Lincoln's bedside. The Secretary of the Navy, Gideon Welles, described "listening to the heavy groans, and witnessing the wasting life of the good and great man who was expiring before" them. Feeling faint, Welles rose at about six in the morning to get some fresh air. When he returned to the parlor, he found James Speed and Edwin Stanton taking evidence concerning the assassination of Lincoln. When Lincoln died shortly after seven that morning, the entire

[47] *New York Tribune*, April 17, 1865.

cabinet, except Treasury Secretary Hugh McCulloch and Secretary of State Henry Seward, met and signed a letter, written by Speed, to Vice President Andrew Johnson informing him of the death of the president and that the "government devolved upon him."[48] Speed was sent to deliver the letter to Johnson. Welles rode home with Speed as the Attorney General undertook the delivery. As they rode, they agreed to have a cabinet meeting that day at noon at the Treasury Department.

As events would later unfold, it would be the men who had been in Lincoln's cabinet, one of whom was savagely stabbed, and others who sat at his bedside as he died, who formed the core of men most intent on trying Jefferson Davis for treason, even after the momentum for the trial was lost. The human emotions generated by watching a man die who had been an admired leader during the struggles of the war years would not quickly fade. Whether they consciously attributed Lincoln's death to Davis, they believed that he had plunged the nation into war and led the South in an unjust conflict. The monstrous nature of Booth's act would stick with Stanton, Seward and Welles. The combination of the long war and the senseless murder of Lincoln after the close of the fighting appeared to harden these men against Southern leadership. They would continue to believe, long after others had given up resolve, that someone should pay for the damages incurred by the Union. With Booth dead, who then should pay, they might ask? Jefferson Davis, the traitor.

[48] Welles, *Diary*, 2:287-288.

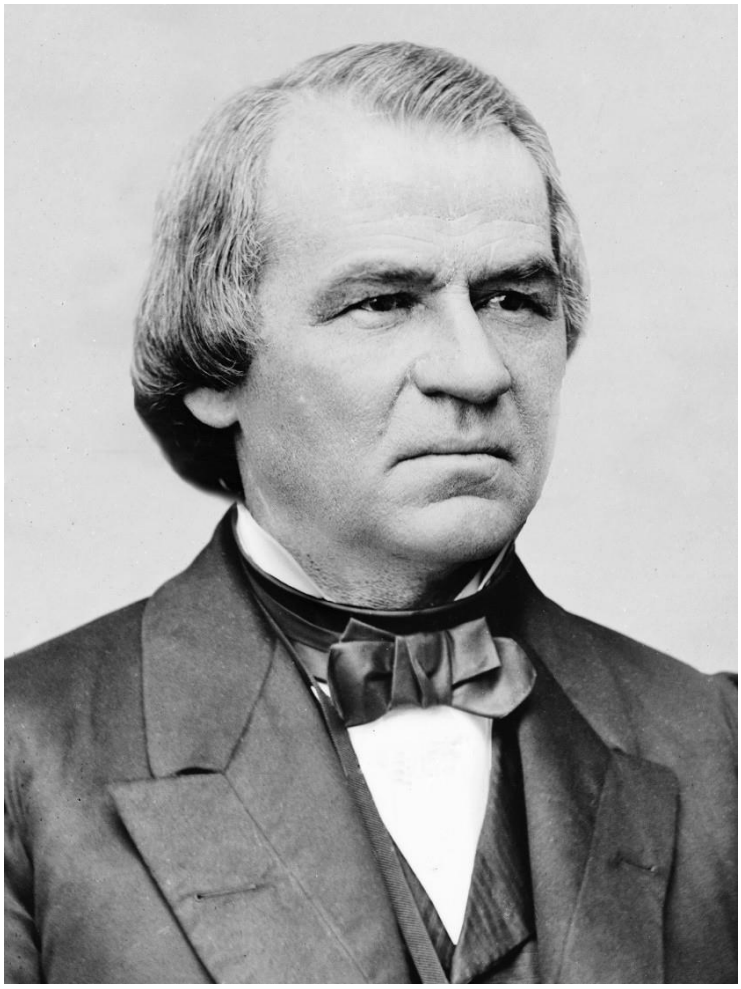

Illustration #2: Andrew Johnson

Andrew Johnson Becomes President

By the time that Welles arrived at the Treasury Building for the first cabinet meeting after Lincoln's death, Andrew Johnson had already been sworn in as president by Chief Justice Salmon Chase. Speed told Welles that Johnson had "expressed a desire

that the affairs of the government should proceed without interruption." The new president told the members of the cabinet that he wanted to conduct business consistent with Lincoln's policies and that "in all essentials it would, he said, be the same as that of the late President."[49] No one can say with certainty whether this was an acknowledgment by Johnson that he was unclear of his path in governance or whether he believed it to be his duty to advance the Lincoln agenda now that the president was dead. Did the new president say this merely to reassure the cabinet that he did not want Lincoln's death to disrupt the government any more than it must? The question must be asked whether he knew what Lincoln's policies were and whether he really could sign on to their continuance. All indications were, in regard to the rebel leadership, that Lincoln supported reconciliation more than exacting punishment. This was in direct contradiction to the position espoused by Johnson who had, for many years during the war, explicitly stated that the rebel leaders should be tried for treason. One thing is for certain - Johnson had not had time to consider his pledge and could not have known whether in the long term Lincoln's path could even be discerned.

There were those in the South who recognized that Johnson's approach to reconstruction might differ significantly from that of Lincoln's. Botts testified before the Joint Committee of Fifteen on Reconstruction that when Lincoln was assassinated "and Mr. Johnson took his place, they [Southerners] remembered Mr. Johnson's declarations in the Senate of the United States before the war, his own treatment during the war by the secession party, and his declarations after he came to Washington as the Vice-President

[49] Ibid. 2:289.

of the United States, in one or more speeches, but especially in a speech in which he declared that treason was a crime which must be punished. They felt exceedingly apprehensive for the security of their property, as well as for the security of their lives."[50] Their apprehension was well founded, especially after it was discovered that the Lincoln assassins had also targeted the vice-president and Ulysses S. Grant.

Even the unflappable Grant could not immediately dismiss the possibility of a wide conspiracy that resulted in Lincoln's assassination. He ordered measures taken to address that threat. On the day after the shooting, Grant telegraphed an order to Major-General Edward Ord in Richmond, directing him to "arrest J. A. Campbell, Mayor Mayo, and the members of the old council of Richmond, who have not yet taken the oath of allegiance and put them in Libby Prison." Grant's entire view of Confederates appear to have undergone a transformation by virtue of Booth's bloody act. "Extreme rigor," he wrote, "will have to be observed whilst assassination remains the order of the day with the rebels."[51] Ord responded very quickly to Grant's telegram warning him of the implications of his order. "Lee and staff are in town among the paroled prisoners. Should I arrest them under the circumstances I think the rebellion here would be reopened. I will risk my life that the present paroles will be kept, and if you allow me to do so trust the people here who, I believe, are ignorant of the assassination, done, I think,

[50] Testimony of John Minor Botts, *Journal of the Joint Committee on Reconstruction*, 287.

[51] Ulysses S. Grant to Edward O. C. Ord, April 15, 1865, *O.R.*, ser. 97:762.

by some insane Brutus with but few accomplices."[52] Ord's caution to Grant that he believed the conspiracy was not widespread and did not involve individuals like Robert E. Lee made sense to Grant. Only four hours later, Grant seems to have recovered somewhat from the shock. "On reflection," he telegraphed Ord, "I will withdraw my dispatch of this date directing the arrest of Campbell, Mayo, and others so far as it may be regarded as an order, and leave it in the light of a suggestion, to be executed only so far as you may judge the good of the service demands."[53] Grant was not one to panic, but as H. W. Brands has written, "he appreciated that the death [of Lincoln] killed the chance of an easy reconstruction,"[54] and might lead the way to Northern vengeance against the rebels.

On Sunday, the cabinet met with the new President at the Treasury Department for the second time. The meeting was to have begun at ten o'clock but the President was a half hour late. Stanton also arrived late with a bundle of papers that he suggested carried forward Lincoln's intentions. With Seward indisposed because of the serious injuries he suffered on the night of Lincoln's assassination and Salmon Chase now out of the cabinet, the Secretary of War seemed poised to fill the power vacuum. The issue of the treatment of the Confederate leadership was discussed and recorded for the first time in the Johnson administration. The Secretary of the Navy, Gideon Welles, wrote in his diary that the men talked about "the general policy of the treatment of the Rebels and the Rebel States. President Johnson is not disposed to treat treason lightly, and the chief

[52] Ibid. Edward O. C. Ord to Ulysses S. Grant, April 15, 1865, ser. 97:762.
[53] Ibid. Ulysses S. Grant to Edward O. C. Ord, April 15, 1865, ser. 97:762.
[54] Brands, *The Man Who Saved the Union*, 378.

Rebels he would punish with exemplary severity."[55] Welles did not say whether any cabinet member voiced a belief that Lincoln would not have sought retribution. Speed certainly believed that "clemency, and not persecution, was, I think, the policy of the government,"[56] but there was no sign that the Johnson administration would advance that policy. Edwin Stanton, writing from Lincoln's death bed at 1:30 in the morning of April 15, 1865 to Major General Dix in New York, stated that "at a Cabinet meeting yesterday, at which General Grant was present, the subject of the state of the country and the prospects of speedy peace was discussed. The President was very cheerful and hopeful; spoke very kindly of General Lee and others of the Confederacy, and the establishment of government in Virginia."[57] Every indication was that Lincoln would have treated the rebel leadership much less harshly than what Johnson advocated. Clemency would mark Johnson's policy towards the vast majority of people who supported the rebellion. It did not extend to the Confederate leadership, however. Whether he realized it or not, Johnson had already begun to shift Lincoln's post war policy.

The shift proved to be dramatic and understandable. Perhaps the assassination of a president made the reversal of policy inevitable. Could any new president sustain an approach to Southern leadership that did not involve some retribution after the murder of its leader at the hands of John Wilkes Booth, a known Southern sympathizer? Even if it was possible, could someone of Johnson's predisposition, who for years advocated the punishment of rebel leaders, now believe that ameliorating his beliefs was the correct

[55] Welles, *Diary*, 2:291.
[56] Testimony of James Speed, *Impeachment Investigation*, 798.
[57] Edwin M. Stanton to John A. Dix, April 15, 1865, *OR*, ser. 97:780.

course of action? Lincoln's death disrupted the government's transition from war time to peace. When Lincoln drew his last breath, he took with him his presidential policy towards the South and the reintegration of the South into the Union. Initially, his successor and his cabinet members were relegated to attempting to surmise what his policy was to have been. Then, as time would pass, the struggle for ascendency on the issue of the South would tear the cabinet apart as Stanton would break with President Johnson and join with the Radical Republicans in the policy for Reconstruction.

Meanwhile, Washington, D. C. was awash in rumor, fear and sorrow. The streets were filled with people overwhelmed with grief and no one knew how far the conspiracy to destroy the federal government extended. Members of the government, themselves concerned for their personal safety, attempted to manage the affairs of government in this tense crisis. Sea-going vessels, trains and other potential means of escape were ordered searched for possible conspirators in Lincoln's death. Stanton wired Winfield Hancock about a proposed meeting that Hancock was to have with the Confederate Colonel John Mosby. "In holding an interview with Mosby it may be needless to caution an old soldier like you to guard against surprise or danger to yourself" during the meeting. "The recent murders show such astounding wickedness that too much precaution cannot be taken."[58]

Major-General Henry W. Halleck issued an order to the officer commanding Union forces at Washington, D.C., that "should either of the murderers or assassins of last night be caught put them in double irons and convey them, under a strong escort, to

[58] Ibid. Edwin M. Stanton to Winfield S. Hancock, April 16, 1865, ser. 97:799.

the commander of the navy-yard, who has orders to receive them and to confine them on a monitor to be anchored in the stream."[59] Shortly thereafter, Halleck prohibited passengers from leaving Washington or Alexandria aboard sea-going vessels. The federal government meant to find the Lincoln conspirators even if it meant shutting down the District of Columbia until they were located.

Many Confederate military leaders also reacted swiftly to the president's death. Lieutenant General Richard S. Ewell of the C.S.A. wrote Grant on April 16, 1865 to voice his repugnance of the crime. "Of all the misfortunes which could befall the Southern people, or any Southern man, by far the greatest, in my judgment, would be the prevalence of the idea that they could entertain any other than feelings of unqualified abhorrence and indignation for the assassination of the President of the United States."[60] He was not alone in his feelings. Confederate Brigadier General J. R. Jones stated that "I trust in God that no Southern man, when all is brought to light, will be found to be in any way accessory to the hellish crime, but on the contrary, that all will feel the utter abhorrence of the act, which is merited by all men."[61] Major John W. M. Appleton was an officer stationed at Fort Warren in Boston Harbor. He oversaw Confederate prisoners housed there. He reported that "the general officers confined at this post as prisoners of war have, from the moment of the reception of the news, expressed their regret for the loss of President Lincoln, and their utmost horror of the act and detestation of his

[59] Ibid. Henry W. Halleck to Christopher C. Augur, April 15, 1865, ser. 97:766.
[60] Ibid. Richard S. Ewell to Ulysses S. Grant, April 16, 1865, ser. 97:787.
[61] *Macon Telegraph,* May 17, 1865.

murderers."[62] Elsewhere, at Elmira, New York, Confederate prisoners held meetings and passed resolutions expressing their condemnation of the assassination.[63]

From a position of safety across the Atlantic, James M. Mason published a letter that angrily refuted any charge that the rebel leadership played a role in Lincoln's death. "It is the crudest conception, too," he wrote, "that the murder of Abraham Lincoln was planned and executed for the purpose of 'aiding the rebel cause.'" Mason's letter may have voiced what many Confederates thought, but were too afraid to say. Who, he questioned, gained from the President's death? "I can well understand that [the claim of Southern involvement] may have material influence in aiding the cause of that overpowering party in the United States, of which Mr. Stanton is the type, and Andrew Johnson, who succeeds as President, with Butler of that notorious prefix, are the exponents and leaders - a party in whose path the late President and his Secretary [Seward] were acknowledged obstacles in their projected schemes of plunder and rapine to follow their domination over the Southern States."[64]

Confederates in the United States were not willing to go as far as Mason. But, newspapers across the South recognized what the assassin's bullet meant. The *Charleston Courier* reported that the murder "was a calamity unlooked for, and will stamp with still deeper infamy the leaders and abettors of the accursed rebellion."[65] The *Augusta Chronicle* told its readers that while the murder "has aroused a tempest of

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[62] Richard S. Ewell to U. S. Grant, April 16, 1865, *O.R.*, ser. 97:787.
[63] *Macon Telegraph,* May 14, 1865.
[64] James M. Mason, letter to the *London Index,* April 27, 1865, reprinted in the *Daily Constitutionalist,* Augusta, Georgia, May 27, 1865.
[65] *Charleston Courier,* April 20, 1865.

indignation throughout the North, ... the more sober journalists are disposed to regard it as the act of a half crazy fanatic; while none, we believe, have been so reckless as to charge the Confederate authorities with complicity in his designs."[66] This proved to be wishful thinking at its best.

Grant's View of Reconciliation After Lincoln's Assassination

Grant's belief that Lincoln sought reconciliation with the South and his efforts to advance this policy continued after Lincoln's death. Major General E. O. C. Ord addressed Grant from Richmond, Virginia on April 17, 1865, where he found several thousand convalescing rebel soldiers at Libby. The question was whether to parole the prisoners under the same terms as Lee's army. Ord informed Grant that "I was trying to make the military government acceptable by kindness where the interests of the Government allowed it."[67] The same day, General Order No. 27 announced that "all officers and soldiers of the Army of Northern Virginia who were not present at the surrender of that army by General Robert E. Lee, at Appomattox Court-House, on the 9th of April, 1865, are hereby informed that the terms of capitulation are extended to them."[68] The interpretation of Lee's surrender terms began almost immediately. On May 6, 1865, an Army Chief of Staff wrote that Grant decided "that under the terms of

[66] *Augusta Chronicle*, April 27, 1865.
[67] Edward O. C. Ord to Ulysses S. Grant, April 17, 1865, *O.R.*, ser. 97:814.
[68] Ibid. General Orders, No. 27, ser. 97:816.

the capitulation all soldiers surrendered by General Lee, or under the terms granted by General Grant, *have a right* to return to their homes at Alexandria, or elsewhere in Virginia, and to remain there as long as they respect their paroles and the laws in force where they reside."[69] In another letter written the same day, the Chief of Staff indicated that "Good faith demands that the privilege be secured to the men [to remain at home in West Virginia], and under General Grant's decision the general cannot permit these paroled men to be driven from their homes by the citizens, in the absence of any specific charges showing that it is dangerous for the community for them to remain."[70] Such was the power of Grant in the aftermath of the war that he felt comfortable stating, unequivocally, what rights might be derived from the terms of the surrender that he had written in his meeting with Lee at Appomattox. His prestige was immense and his interpretation was not challenged insofar as his terms of surrender influenced the rights of former Confederate soldiers. Grant either believed that he should not attempt to influence the treatment of Confederate political leaders or believed that he did not have the authority to do so. In either case, Jefferson Davis would not have the protection that Confederate military men found in Grant.

The differentiation in treatment between civilian and military personnel had existed even during the war. Residing in a loyal state did not protect individuals from arrest. It was not unusual for those suspected of harboring rebel sympathy to find themselves under arrest. From the war's beginning, military commanders in loyal states

[69] Ibid. C. H. Morgan to C. C. Augur, May 6, 1865, ser. 97:1103.
[70] Ibid. C. H. Morgan to William H. Emory, May 6, 1865, ser. 97:1104.

maintained control of the civilian populations by arresting civilians they believed to be disloyal. As early as September 1861, General John C. Fremont began the practice of trying civilians before military tribunals. As Jonathan W. White has noted, when Lincoln suspended the writ of habeas corpus, other constitutional protections, including the right to be tried criminally in a civil court rather than before a military tribunal, fell by the wayside. Indeed, civilians were routinely tried in military courts for actions as minor as verbally abusing Union soldiers.[71] On August 8, 1862, Edwin Stanton authorized United States marshals and other law enforcement officials "to arrest and imprison any person or persons who may be engaged, by act, speech, or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or in any other disloyal practice against the United States."[72] This order received a presidential confirmation shortly thereafter. In the *Proclamation suspending the Writ of Habeas Corpus,* signed on September 24, 1862, Lincoln subjected to arrest those individuals who had committed specific acts, but also those who were "guilty of any disloyal practice," a phrase so vague as to give military commanders vast authority to arrest virtually anyone known to be a Southern sympathizer. A key provision of the proclamation was the substitution of a court martial or trial by military commission rather than civilian court. It has been estimated that over 4,000 civilians faced court-martial or were tried before military

[71] Jonathan W. White, *Abraham Lincoln and Treason in the Civil War: The Trials of John Merryman,* (Baton Rouge: Louisiana State University Press, 2011), 77-80.
[72] Edwin M. Stanton, August 8, 1862, *O.R.,* ser. III, 123:321.

commissions during the civil war.[73] Indeed, Series II, Volume 2 of the *Official Records* encompasses over 1,500 pages on the "Treatment of Suspected and Disloyal Persons North and South," during the war. Many prisoners are alleged to have engaged in "treasonable language" or "general disloyalty."[74] No one in the North or South would have been surprised if the leaders of the rebellion had been handed over to military tribunals for trial.

The legal process against individuals who had conspired against the United States government did not suddenly end with Lee's surrender. On May 9, 1865, members of the secret society known alternatively as the Order of American Knights or Order of the Sons of Liberty, were ordered to be hanged by the Secretary of War. These men, Lambdin P. Milligan and seven others, had been tried by a military commission in Indianapolis, Indiana in October 1864. The charges were that they had conspired against the government of the United States, that they had afforded aid and comfort to rebels against the authority of the United States, that they had incited insurrection, that they had engaged in disloyal practices and that they had committed acts in violation of the laws of war.[75] Milligan was a citizen of Indiana who was not in the military or naval service, yet he was tried before a military commission rather than a civil court in Indiana. In mid-

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[73] Lincoln's Proclamation Suspending the Writ of Habeas Corpus, September 24, 1862, *Collected Works*, 5:436-437; Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties*, Oxford University Press, New York 1991, page 233-234.

[74] See, for instance, *O.R.*, ser. II, 115:250-252.

[75] Ibid. J. W. Walker, May 9, 1865, General Orders No. 27, ser. 121:543-549, ordering the hanging of Milligan and others after trial before a military commission.

1864, when the fate of the nation hung in the balance, this action may have been understandable. However, Confederate leaders must have been worried by the federal government's upholding the trial and verdict of the military commission even after the war had ended. By the very composition of the tribunal, military commissions posed a greater threat of serious punishment for individuals being tried before them. Union officers sitting on the commission, who had suffered the privations of war and seen the terrible toll that the conflict had taken on their lives and the lives of those in their units, would be much less likely than a civilian juror to sympathize with an accused. The punishment of civilians by military commissions in a northern state did not bode well for how Southern leaders would be treated.[76]

The terms of Lee's surrender on April 9, 1865 gave Southerners every reason to believe that Confederate leaders might be treated under extraordinarily generous terms. John Wilkes Booth and the conspiracy which he headed murdered the most powerful Republican leader in the North. They ended the life of one whose conciliatory spirit might have blocked the effort to punish Southern leaders for treason. Union leaders feared that Booth's plot may have germinated in Richmond with the knowledge of Jefferson Davis. Viewed from this vantage point, the flight of Davis and members of his cabinet took on a more sinister tone to Northerners. In the charged atmosphere after

[76] Lambdon Milligan's case would be appealed to the United States Supreme Court. In *Ex Parte Milligan*, 71 U.S. 2, 18 L.Ed. 281, 4 Wall. 2 (1866) the case would form the basis of a seminal opinion on the question of trials of civilians by military commissions. However, in May 1865, it remained clear that the government could prosecute non-military civilians before military commissions.

April 14, 1865, the cool reflection necessary in making a decision on whether to try Confederates for treason was lost. The capture of Davis became the paramount goal. The question of what to do with him if he was caught became secondary. As will be seen, the change in Northern attitudes had a profound impact on Southern leaders in the months after the end of the Civil War.

I never cease to regret that Jeff. Davis was not shot at the time of his capture."[1] – *Charles Sumner*

Chapter 2

The Severest Penalties of Your Crime

Davis left Richmond before Lincoln's death, intent on eluding Union forces. His conduct did not change after word of Booth's crime reached him. Perhaps he feared being caught and put on trial for treason, but if he harbored this fear, it was not evidenced by his words. He still believed the Confederate States of America to be a viable nation. If the armies collapsed and the Confederacy died, he hoped to escape the United States mainland. These were the concerns that occupied his mind as he moved south with his cavalry escort. How he fit into Lincoln's political plans for the future did not motivate his movements. Still, the Administration's blueprint for the nation after the war must take into consideration what to do with Davis if he was overtaken.

Implicit in Lincoln's comment that he would not mind if Jefferson Davis escaped capture is Lincoln's perception that having the Confederate president in custody would bring a host of problems that could be avoided if Davis simply eluded federal authorities until he made it out of the country. By nature, Lincoln was not a blood-thirsty man. His statement might simply have been one which reflected his feeling that enough sacrifice had been made in the war. But, it betrayed Lincoln's belief that Davis would become a

[1] Charles Sumner to Salmon P. Chase, June 25, 1865, *The Selected Letters of Charles Sumner,* Beverly Wilson Palmer, ed., 2 vols., (Boston: Northeastern University Press, 1990), 2:311-312.

distraction to re-union of the North and South. Decisions on whether Confederate leadership should be indicted for treason would certainly lose steam if the head of the rebel government, because of his absence from the country, was not susceptible to trial. And actually putting Davis to trial for treason would divide the nation even further while exposing the federal government to the negative consequences of an acquittal.

In his work entitled, *The Rise and Fall of the Confederate Government*, Davis wrote that after the war's end, "nothing remained to be done but for the sovereigns, the people of each State, to assert their authority and restore order. If the principle of the sovereignty of the people, the cornerstone of all our institutions, had survived and was still in force, it was necessary only that the people of each State should re-consider their ordinances of secession, and again recognize the Constitution of the United States as the supreme law of the land. This simple process would have placed the Union on its original basis, and have restored that which had ceased to exist, the Union by consent."[2] Sixteen years after Lee's surrender, his suggestion was that all simply should have been forgotten and forgiven. His solution ostensibly would have permitted the same men who led the South out of the Union to lead their states back into the national government. This was a result that many in the North found unacceptable.

However, in April 1865, he was more intent on fleeing the country - reconciliation with his former nation was not paramount in his mind. With the collapse of the Confederacy, many rebel leaders were able to escape to foreign countries. He

[2] Jefferson Davis, *The Rise and Fall of the Confederate Government*, 2 vols. (New York: D. Appleton & Company, 1881), 2:718.

hoped to join them in exile. Immediately after the war, Davis, along with his family and others, moved rapidly in an attempt to evade capture by the federal government.

As he fled Richmond and moved through North Carolina towards Georgia, Davis held out a strange hope of rallying the South. As late as April 21, 1865, Davis exhibited his intention to continue the bloody struggle. Brigadier General Thomas Munford, in command of a Confederate cavalry brigade, ordered his men to continue the war after having received a communication from Davis "ordering us again to the field in defense of our liberties." Reliant upon the news that General Joseph Johnston still had an army in the field capable of upholding the Confederate banner, Munford urged his men to assemble once again and resume the war. The futility of his call was evident by the order asking the men to "renew our vows, and swear again by our broken altars to be free or die."[3] Davis believed that Johnston's army "holding its position with determination to fight on, and manifest ability to maintain the struggle, will attract all the scattered soldiers and daily and rapidly gather strength."[4] This was a fantasy. Davis continued his flight south while the Union army's round-up of rebel leaders yielded many of the top Confederate government officials.

The stakes in Davis' pursuit were raised by two acts of Andrew Johnson. First, on May 1, 1865, he issued an order that the Lincoln conspirators could be "lawfully

[3] Thomas T. Munford, Special Orders, No. 6, April 21, 1865, *O.R.*, ser. 97:1395.
[4] Ibid. Jefferson Davis to Zebulon B. Vance, April 11, 1865, ser. 97:1393.

triable before a Military Commission."[5] And second, he issued a presidential proclamation on May 2, 1865, stating that the Bureau of Military Justice had evidence that linked Davis and others to the conspiracy that resulted in the murder of Lincoln. A reward of $100,000 was offered for the arrest of Davis.[6] Over the next week, the Union army worked tirelessly to cut off Davis' possible routes of escape and capture him. Orders went out to those involved in the search to "make every endeavor to capture or kill Jeff. Davis, the rebel ex-President."[7] Their efforts even extended to suggestions that federal military officers "use every persuasion to induce the disgusted secesh to join in hunting him."[8] Just the day before the presidential proclamation, James Speed had given Johnson a written opinion that person implicated in Lincoln's murder "not only can, but ought to be tried before a military commission."[9]

The treatment of individual rebel leaders was haphazard. Henry S. Foote, a member of the Confederate Congress, was ordered in January 1865 to be arrested by James A. Seddon, the Confederate Secretary of War as he traveled to Washington, D.C., ostensibly to negotiate a peace treaty.[10] He was taken prisoner by Union officials and

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[5] *The Papers of Andrew Johnson,* "Order for Military Trial of Presidential Assassins," May 1, 1865, 8:12.
[6] Ibid. Andrew Johnson, A Proclamation, May 2, 1865, ser. 104:566-567.
[7] Ibid. Thomas W. Scott to Horace N. Howland, May 8, 1865, ser. 104:665.
[8] Ibid. Christopher C. Washburn to Otto Funke, May 8, 1865, ser. 104:677.
[9] James Speed, "Opinion on the Constitutional Power of the Military to Try and Execute the Assassins of the President," (Washington: Government Printing Office, 1865), 16.
[10] H. S. Doggett to Isaac H. Carrington, January 13, 1865, *O.R.*, ser. 121:68-69.

paroled. On May 1, 1865, Foote wrote President Johnson from New York City requesting a modification of the parole given him by the Union to permit him to travel to the Pacific coast via Ohio, where he wanted to visit an old friend. Johnson referred the request to Edwin Stanton "with the suggestion that unless Mr. Foote goes beyond the limits of the United States proceedings be had with a view to his indictment for treason."[11] Stanton telegraphed that Foote had 48 hours to leave the United States. Foote left the country within the specified time frame.[12] Clearly, some prizes were bigger than others.

Meanwhile, Southern state leaders found out that their state's comity *vis-a-vis* the federal government was to be re-defined. Once defeated, they would not simply rejoin the Union. Georgia governor Joseph E. Brown attempted to call the Georgia state legislature into session to address "the complete collapse in the currency and the great destitution of provisions among the poor,"[13] but was told by military authorities that he must first seek authorization from Washington. His letter to Andrew Johnson was met with a response drafted by Stanton who indicated that the response to Governor Brown should be, in part, as follows:

> That the collapse in the currency and the great destitution of provision among the poor of the State of Georgia mentioned in his telegram have been caused by the treason, insurrection, and rebellion against the authority, Constitution, and laws of the United States, incited and carried on for the last four years by Mr. Brown and his confederate rebels and traitors, who are responsible for all the want and destitution now existing in that State. Second. What Mr. Brown calls the result which the

[11] Ibid. Andrew Johnson to Edwin M. Stanton, May 4, 1865, ser. 121:526.
[12] Ibid. John A. Dix to Edwin M. Stanton, May 16, 1865, ser. 121:557.
[13] Ibid. Joseph E. Brown to Andrew Johnson, May 6, 1865, ser. 104:630.

> misfortunes of war have imposed upon the people of Georgia and all the miser, loss, and woe they have suffered are chargeable upon Mr. Brown and his confederate rebels, who usurped the authority of the State and, assuming to act as its Governor and Legislature, waged treasonable war against the United States, and by means of that usurped authority protracted the war to the last extremity, until compelled by superior force to lay down their arms and accept the result which the fortunes of war have imposed upon the people of Georgia as the just penalty of the crimes of treason and rebellion. Third. That the restoration of peace and order cannot be intrusted to rebels and traitors who destroyed the peace and trampled down the order that had existed more than half a century and made Georgia a great and prosperous State.[14]

A warrant was issued for Brown's arrest.

R. M. T. Hunter, a Confederate Senator, was arrested by order of Grant on May 11, 1865, as was Judge John Campbell, the former United States Supreme Court justice and one of the Confederate emissaries at the Hampton Roads Conference shortly before the end of the war. Hunter immediately wrote "to know if I could obtain the amnesty upon the conditions mentioned in the amnesty proclamation."[15] According to Major General Henry Halleck, Campbell, "very destitute and much broken down," surrendered himself "to such punishment as the Government may see fit to impose."[16] Stanton responded to Halleck that Judge Campbell had "labored as far as he dared to keep the rebellion alive. This impression is very strong in the North."[17] Fantastic rumors spread, frightening people in the North and leading Union authorities to investigate wild claims. For instance, Joseph Holt requested proof that Libby Prison had been mined with

[14] Ibid. Edwin M. Stanton to J. H. Wilson, May 7, 1865, ser. 104:646-647.
[15] Ibid. R. M. T. Hunter to H. W. Halleck, May 11, 1865, ser. 121:551.
[16] Ibid. H. W. Halleck to Edwin M. Stanton, May 11, 1865, ser. 121:550.
[17] Ibid. Edwin M. Stanton to H. W. Halleck, May 11, 1865, ser. 121:551.

explosives to kill all the prisoners prior to their release.[18] Emotions ran high in the North because it appeared that the South was capable of any atrocity because of Lincoln's assassination. In the atmosphere of May 1865, no action seemed too vile for the South to commit. It was under these conditions that Southern leaders were being pursued and apprehended.

The net was wide. Not only was Captain Henry Wirz, the commander of Andersonville ordered arrested, but so was Colonel George C. Gibbs, who denied having anything to do with maltreatment of any Union soldier held at the prison. In a post-script denying any ability to influence events at the prison, Gibbs related that "Wirz commands by order of the Secretary of War."[19] Since the Secretary of War was in Jefferson Davis' cabinet and appointed by Davis, Wirz derived his authority directly from Richmond. As the conditions at Andersonville were uncovered, Davis would find himself implicated in the atrocities found at that camp. But Davis's sole interest was getting away from the reach of federal forces.

As Davis fled through Georgia, he found it more and more difficult to proceed with his cavalry escort. By May 7, federal officials were able to report that they were so close on his heels that Davis had disbanded his escort. Three of the regiments that had served as his protection surrendered themselves to Union officials in northern Georgia.[20] Telegraphic inquiries into the whereabouts of Davis now rushed over the wires several

[18] Ibid. Edwin M. Stanton to H. W. Halleck, May 11, 1865, ser. 121:551.
[19] Ibid. George C. Gibbs to Edward M. McCook, May 12, 1865, ser. 121:552-553.
[20] Ibid. James H. Wilson to John M. Schofield, May 7, 1865, ser. 104:648.

times a day. Brevet Major-General J. H. Wilson, part of William Tecumseh Sherman's command, and officer whose troops were bearing down on Davis, pressed his subordinates to keep him informed and to "watch every train closely; he might try that way."[21] The pressure from Washington to capture the Confederate was intense and Union officials pushed the officers in the field relentlessly.

Stanton's micromanagement began to grate on the nerves of the high-strung Sherman. At midnight on May 8, 1865, Sherman telegraphed Ulysses S. Grant updating him on Davis's flight and Wilson's pursuit. Sherman told Grant that Davis "cannot escape save in disguise," and then posed the question, "Does the Secretary of War's newspaper order take Wilson from my command or shall I continue to order him? If I have proven incompetent to manage my own command let me know it."[22] Even Wilson began to sense a straining of his relationship with Sherman caused by Stanton's intervention. Wilson wrote to Sherman, who was hundreds of miles away, to tell him that Wilson's three divisions had marched over 220 miles in six days and that while Davis was a fugitive, the rebel president had been forced to drop the treasure that he had been carrying while Wilson's men were "looking for him in all directions."[23] That same day, Wilson ordered the publication and distribution of the presidential proclamation offering

[21] Ibid. James H. Wilson to Beroth B. Eggleston, May 7, 1865, ser. 104:654.
[22] Ibid. William T. Sherman to U. S. Grant, May 8, 1865, ser. 104:662.
[23] Ibid. James H. Wilson to William T. Sherman, May 8, 1865, ser. 104:663.

rewards for Davis's capture as hand-bills and broadsides to encourage civilians to assist in the location of Davis.[24]

The annoyance that Sherman felt in Stanton's hand in the pursuit was well-founded. Stanton routinely telegraphed Wilson directly, bypassing Wilson's commander, Sherman, and issued orders, such as those issued for the arrest of Governor Brown and the seizure of his papers, an order that should have gone through Wilson's chain of command. As might be expected, Wilson responded directly back to the Secretary of War.[25] Stanton, to the annoyance of many, filled the power vacuum at the top of the Executive branch of the nation's government whenever he could. He used every ounce of energy to drive his subordinates in an effort to abort Davis's escape.

Stanton's efforts paid off when the Union forces closed in on Davis. As the dragnet tightened, the fear that he might escape mounted. Wilson confessed that "my scouts have not yet been able to get upon a substantial trail since Davis left Washington, [Georgia]."[26] A rumor circulated that he had reached a rebel ship and sailed away from Florida, perhaps for Cuba.[27] In fact, federal soldiers were rapidly bearing down on his party. Finally, early on the morning of May 10, 1865, members of the Fourth Michigan

[24] Ibid. James H. Wilson to Beroth B. Eggleston, May 8, 1865, ser. 104:666.
[25] Ibid. James H. Wilson to Edwin M. Stanton, May 9, 1865, ser. 104:680.
[26] Ibid. James H. Wilson to John M. Palmer, May 9, 1865, ser. 104:690.
[27] Ibid. Gideon Welles to Henry K. Thatcher, May 9, 1865, ser. 104:694.

Cavalry surprised and arrested Davis at Irwinville, Georgia. They overtook him and his party, along with five wagons and three ambulances.[28]

The capture of Davis has been well documented by historians and by his contemporaries. To Davis and his family, the federal government's colossal efforts to capture him were completely unwarranted. A Union officer present at his capture reported that "he expressed great indignation at the energy with which he was pursued, saying that he had believed our Government more magnanimous than to hunt down women and children."[29] The vigorous nature of the search for Davis should have indicated to him that the perception of him in the North was not what he understood it to be. He later admitted to being perplexed at why the Union forces would pursue him so aggressively. It should also have revealed to him a glimpse of the long and dangerous road on which he was now to travel. In his exhaustion and embarrassment it does not seem to have occurred to him that the pursuit was more than simply an attempt to capture him for his role as president of the Confederacy. Instead, he was thought to be a notorious traitor, assassin and war criminal.

Not everyone who was fleeing during the fall of the Confederacy failed to see the implications of their pursuit by federal officials. Clement C. Clay, Jr. wrote to Major-General J. H. Wilson from La Grange, Georgia on May 1, 1865. "I have just seen a proclamation by the President of the United States offering a reward of $100,000 for my

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[28] Ibid. Benjamin D. Pritchard to Thomas W. Scott, May 11, 1865, ser. 104:721-722.

[29] Ibid. James H. Wilson to Edwin M. Stanton, May 13, 1865, ser. 104:743.

arrest on a charge of having, with others therein named, incited and concocted the murder of the late President," he wrote. "Conscious of my innocence, unwilling even to seem to fly from justice, and confident of my entire vindication from so foul an imputation upon a full, fair, and impartial trial, which I expect to receive, I shall go as soon as practicable to Macon to deliver myself up to your custody."[30] Clay, unlike Davis, understood the grave criminal allegation under which he was cast. Clay's sense of honor impelled him to stop his flight and turn himself in to Union authorities and underscored the realistic view he had of the accusations against him. Two days after sending this telegram, Clay gave himself up. If flight could be construed as an indication of a person's guilt, Clay wanted nothing of it.

The anxiety of Union officials concerning the transport of Jefferson Davis on the steamer *Clyde* to his destination at Fort Monroe reveal how federal officials considered this to be a trip fraught with danger. Stanton, who had been closely involved in most of the decisions regarding the detention of Confederate leaders, orchestrated virtually every detail of Davis' movement from Georgia and his incarceration at Fort Monroe. His animus towards Davis became evident by written statements in official documents. For instance, he wrote in a postscript on May 14, 1865 that "Jeff. Davis was caught three days ago in Georgia trying to escape in his wife's clothes."[31] It was also revealed in his undeniable obsession with the rebel commander-in-chief's imprisonment. The

[30] Ibid. Clement C. Clay, Jr. to James H. Wilson, May 10, 1865, ser. 104:733.

[31] Ibid. Edwin M. Stanton to Rev. Breckinridge, May 14, 1865, ser. 121:555.

willingness to humiliate Davis permeated the North. Major-General Henry W. Halleck telegraphed Stanton that "if Jeff. Davis was captured in his wife's clothes I respectfully suggest that he be sent north in the same habiliments."[32]

The next day Stanton telegraphed Halleck ordering him to bomb-proof Fort Monroe in preparation for Davis' confinement. He stated that Davis would remain at Fort Monroe "until tried, which will be immediately after his arrival. His trial and punishment, if there by any, shall be in Virginia."[33] Halleck immediately set to work preparing 10 or 12 escape-proof casements.[34] Stanton admonished Lt. Col. Benjamin Pritchard "to take every precaution to secure your prisoner and prevent rescue or escape. For that purpose he must be treated as any other criminal. Call on the naval commander at Savannah for convoy if you need it, and upon all military commanders for force. Report your arrival from point to point."[35]

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[32] Ibid. Henry W. Halleck to Edwin M. Stanton, May 13, 1865, ser. 104:741.

[33] Ibid. Edwin M. Stanton to Henry W. Halleck, May 14, 1865, ser. 104:759.

[34] Ibid. Henry W. Halleck to Richard Delafield, May 15, 1865, ser. 104:773.

[35] Ibid. Edwin M. Stanton to Benjamin D. Pritchard, May 14, 1865, ser. 104:761-762.

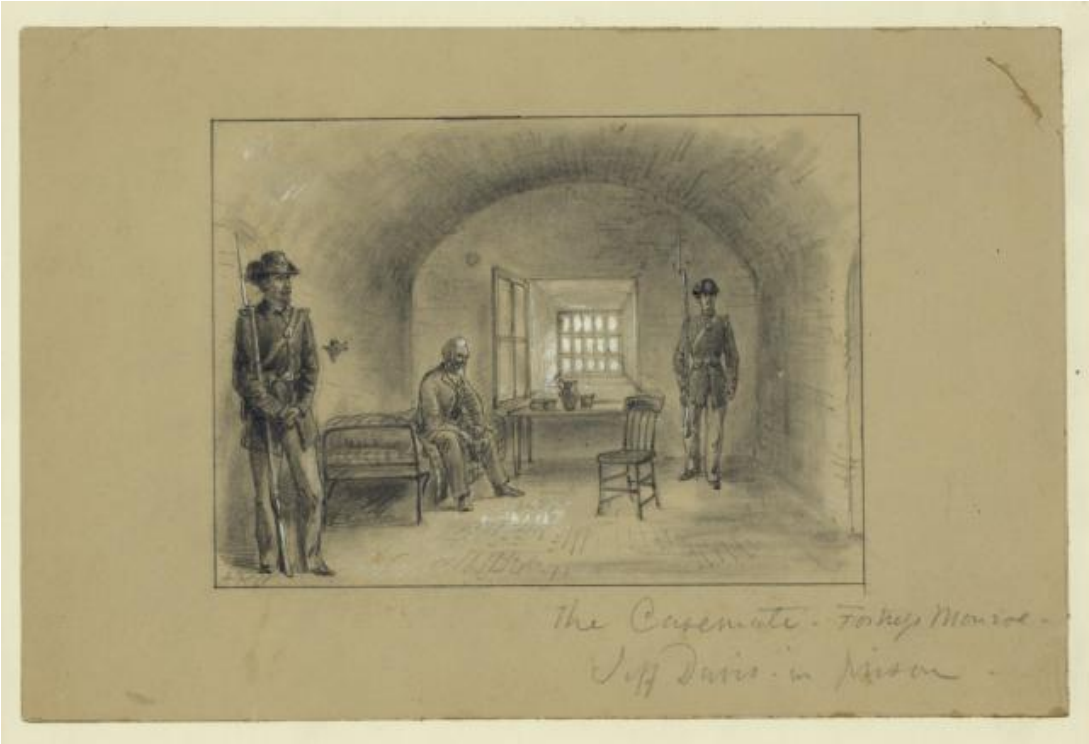

Illustration # 3: Davis in his Cell

Even once Davis was at Fort Monroe, Stanton's hand was visible. It was over his signature that orders went out detailing where each Confederate leader was to be housed. He also decided that Varina Davis had lost her freedom to travel. Davis's wife and children were ordered away from Norfolk, Virginia and could not travel north. The one concession was that Mrs. Davis was allowed to decide where in the South she wanted to proceed. Absolutely no one was to be allowed to visit with Davis or communicate with him in writing.[36] If Davis had ever believed that he would be treated with gentility upon his capture, he was certainly relieved of that notion by the time he arrived at Fort

[36] Ibid. Edwin M. Stanton to Henry W. Halleck, May 19, 1865, ser. 104:837.

Monroe. That he would be tried was not to be doubted. The only remaining questions were the criminal charge and the forum that he would face.

The jurisdiction of military commissions extended deep into the lives of ordinary citizens during the Civil War. Prosecutions were conducted against individuals for charges stemming from violations of the laws of war, for manufacturing arms for the enemy, and for cutting telegraph wires between military posts, allegations that derived directly from the conduct of the war. But the types of cases heard by military commissions also involved ordinary crimes. The jurisdiction of a military commission was determined by whether the geographic area was under a military government, and the status of martial law in the area. If an area was under military government or martial law but the civilian courts continued to operate freely, then there may be a concurrent jurisdiction over ordinary crimes.[37] Davis, imprisoned in Virginia, fell within the jurisdiction of a military commission on any charge that could have been brought against him. Officials in Washington were faced with making serious choices about how to treat Davis.

Many people sought to assure the new president that his inclination to punish treason was correct. Former Lincoln vice-president Hannibal Hamlin wrote that "whatever timid or time serving men may say we the people believe treason is a crime to be punished, and that the only *security* for the future."[38] Johnson showed no hint of

[37] William Winthrop, *A Digest of Opinions of the Judge Advocate General of the Army,* (Washington: Government Printing Office, 1880), 328 - 330.
[38] Hannibal Hamlin to Andrew Johnson, May 3, 1865, *Papers of Andrew Johnson,* 8:20.

moderating his long held opinions. Speaking to a delegation from Pennsylvania, he said, "I, too, think the time has arrived when the people of this nation should understand that treason is a crime."[39] He did distinguish between the roles people took in the rebellion. In his view, there were "some who have been engaged I this rebellion, who, while, technically speaking, are guilty of treason, yet are morally not."[40] To these men, he would offer reconciliation. But "to those who have deceived – to the conscious, influential traitor, who attempted to destroy the life of a nation, I would say 'On you be inflicted the severest penalties of your crime.'"[41]

President Johnson initially involved himself extensively in the decision making process involving the former Confederate president. In May 1865, Johnson and his close friend, Preston King of New York, met with Judge John C. Underwood, the federal district judge for the Eastern District of Virginia, in Washington, D.C., to discuss the Davis prosecution. With Congress not in session until December, Johnson held the reins of action. The President and King told Underwood that it was their opinion that the more prominent and guilty leaders of the Confederacy had committed treason and should be indicted and punished for their conduct. Salmon P. Chase, Chief Justice of the United States Supreme Court, was not present for the interview, but wrote a "Statement of the Case" years later that included details that he indicated were taken from a "Memorandum furnished by Judge Underwood." According to Chase's rendition, Underwood had taken

[39] Andrew Johnson, "Interview with Pennsylvania Delegation," May 3, 1865, *Papers of Andrew Johnson*, 8:21.
[40] Ibid. 8:21-22.
[41] Ibid.

the position during the war, perhaps influenced by his "education in the principles of the Society of Friends and his former hostility to capital punishment" that the great conflict had outgrown the character of a rebellion, and had assumed the dimensions of a civil war, and that sound policy and humanity demanded that the technical treason of its beginning should be ignored, and that it should be treated only as a civil war, and those engaged in it only as enemies."[42] Caught up in the events of the day, the judge agreed to present a newly formed grand jury with a charge as proposed by Johnson and King to obtain treason indictments against Confederate leaders.

That Underwood met with Andrew Johnson and Preston King is undoubtedly correct. However, Chase's account, again, written years later, possibly contains a slant that he sought to justify his own legal position and bolster his political aspirations. Chase makes it appear that Underwood held the legal opinion during the war that Chase took after the war - that leading a rebellion might be treasonous but that engaging a civil war was not. Chase wrote that Underwood thought "that the technical treason of its beginning should be ignored." Whether the substance of Chase's account is accurate or not the one important fact that can be established is that President Johnson had decided that Davis and others should be prosecuted for treason after the war, and took the unusual step of meeting with a federal judge to encourage that the leading rebels should be formally charged.

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[42] Bradley T. Johnson, *Reports of Cases Decided by Chief Justice Chase in the Circuit Court of the United States*, (New York: Diossy & Company, 1876), 6.

Upon Underwood's return to Norfolk, he met with the members of the grand jury and charged them with the duty of bringing to justice men who had waged war against the United States. The charge began with the statement that "you will be compelled by your regard for country, freedom and humanity to present for trial the authors and conductors of the most gigantic, bloody and unprovoked crimes that ever cursed our world." He admonished the jurors to pass not only on those who caused battlefield deaths, but also on those who caused "the greater agonies and tortures of starvation in Libby Prison, on Belle Island, at Salisbury and Andersonville."[43] Both Belle Island and Libby Prison were Confederate prisons housing Union soldiers in Richmond, Virginia. They were located within the jurisdictional boundaries of the Eastern District of Virginia. That was not so with Salisbury and Andersonville. Salisbury prison camp was located in North Carolina and the infamous Andersonville prison was in Georgia. If the grand jury found that the executive leadership of the Confederacy caused the war-crimes committed at these distant prisoner of war camps, President Johnson wanted them to be prosecuted for the crime.

The charge does not read like a modern jury charge, in which great care is taken to remove any emotion from a jury's deliberations. Instead, the charge is rife with explosive language. The jurors were "to review the conduct and motives of men whose lust of power and greed of gain are without a parallel; whose thirst for notoriety, strangely desired and courted, and finally acquired the public gaze, only to sink them to

[43] *New York Tribune,* June 5, 1865. See the Appendix A for a more complete charge to the Grand Jury.

disgrace and infamy." In a single paragraph, Underwood defined treason for the jury, reminding them that the guilty may be civilians who would be no less guilty than those who raised arms against the Union. The judge acknowledged that "universal prosecution would be unreasonable and impossible" for the hundreds of thousands who "are technically guilty of treason," but left it for the grand jurors "to decide who and how many of the most prominent and guilty, are to answer to the violated laws of the Country."[44] Judge Underwood, already hatred by Southerners, would find himself demeaned by the press for the jury charge he issued in the case.

The *Petersburg News* editorialized that:

> the first official function of a public character which he (Underwood) discharged on the return of peace, is to launch against a citizen of this State, the latchets of whose shoes he is unworthy to loose, a proclamation which, for violence, blasphemy and unfounded aspersion of a brave and chivalrous people, beggars imagery and defies comparison. No sooner had this charge been issued than its object was unfolded in the summoning of a cloud of witnesses before the grand jury, in order to base on their evidence an indictment against General Lee. [45]

The fact that "General Grant could afford, not only to pardon General Lee, but to exhaust the etiquette of conventional respect in all his intercourse with him,"[46] was pointedly remarked upon by the Southern press. Grant's conduct towards the rebels had not deterred Underwood. Similarly, the *Philadelphia Inquirer* urged that Underwood's conduct not be approved. The newspaper did not challenge his loyalty or impugn his integrity, but noted that treason trials would lead to many unforeseen difficulties. Its

[44] Ibid.
[45] *Daily Age*, June 15, 1865.
[46] Ibid.

editors argued that "the Government of the United States should be allowed, as the guardians of the whole people, to manage this whole question in its own way."[47] The public perception was that the grand jury proceeding initiated by Underwood was overreaching. The *Philadelphia Inquirer* implored the President and his advisors to determine who might be an offender worthy of prosecution, not a grand jury from Norfolk, Virginia.

Complicating the messy legal questions swirling after the war, Underwood wrote that "to an inquiry which has been made by an officer of the Court, whether the terms of parole agreed upon by Gen. Lee were any protection to those taking the parole, the answer is, that was a mere military arrangement, and can have no influence upon civil rights or the status of the persons interested."[48] This contradicted the understanding held by members of the military forces, both Southern and Union, that was reached during the last days of the war. The written terms of parole of nearly every Confederate officer and soldier who surrendered to a Union force, stated that "each officer and man will be allowed to return to his home, not to be disturbed by U. S. authority so long as they observe their paroles and the laws in force where they may reside,"[49] or contained language very similar to that. As previously noted, Lt. General Ulysses S. Grant had staked the immense prestige of his position on the understanding "that under the terms of the capitulation all soldiers surrendered by General Lee, or under the terms granted by General Grant, *have a right* to return to their homes at Alexandria, or elsewhere in

[47] *Philadelphia Inquirer*, June 8, 1865.

[48] *New York Tribune*, June 5, 1865.

[49] Ulysses S. Grant to Robert E. Lee, April 9, 1865, *O. R.*, ser. 95:58.

Virginia, and to remain there as long as they respect their paroles and the laws in force where they reside."[50] Now Judge Underwood charged the jury that the magnanimous terms of the Union army at Appomattox and elsewhere that seemed to move so well towards the reconciliation of the two warring sections of the country were not legally binding on the question of treason. If true, every military officer who had surrendered with the understanding that there would be no legal recriminations that would follow their surrender could be subjected to prosecution for treason. Underwood's charge also appeared unreasonable because there was no other branch of government that had made that claim. Adding to the perception that Underwood was the wrong man to try treason trials because of a bias were the newspaper accounts that indicated that he "is sincerely desirous that the Wilson, Sumner and Wade policy may be adopted, as the only sure means of saving the South from civil anarchy and ruin."[51] Being linked to the Radical Republicans by the press could only cause concern for his ability to impartially administer justice.

The charge, standing alone, was a remarkable document. It gave members of the grand jury no guidance on who, if anyone, should be tried for treason or war crimes. Typically, the government conducts its own investigation prior to presenting evidence to a grand jury. The district attorney then briefs the members of a grand jury regarding the alleged crimes to be investigated and leads the grand jury through the investigation, calling and questioning witnesses, and presenting documentary evidence. In highly

[50] Ibid. Charles H. Morgan to Christopher C. Augur, May 6, 1865, ser. 97:1103.

[51] *New York Tribune*, May 29, 1865.

publicized cases, the grand jury investigation can prove lengthy. Moreover, grand juries can call their own witnesses, engage in questioning, and take over the investigative process if they choose. However, because it falls to the district attorney to try cases that are indicted by grand juries, the attorneys seldom voluntarily completely relinquish the reins to a grand jury. It is nearly inconceivable that a seasoned prosecutor would permit a grand jury to take on a case of the magnitude of the treason and war crimes investigation without close supervision of their work. That was not done in this case.

Chief Justice Chase gave an opinion that may have explained the quick work of the grand jury. He wrote that:

> concerning acts which have reached such a measure of notoriety that they can not be lawfully be gainsaid, judicial investigation or *trial* is impossible. It is obvious that every material fact in the action of Jefferson Davis against the government was of this public nature.[52]

In much that vein, a grand jury might have gone into deliberations without the need of extensive testimony to establish who the major leaders were of the South. Perhaps this influenced the decision to permit the grand jury to operate independently. Even if this was the reasoning behind the lack of direction provided by the prosecution, it gave the appearance that the government's prosecution of the rebel leaders was haphazard.

The indictments, filed on June 4, 1865, in Norfolk, Virginia, charged rebel military leaders, including Robert E. Lee, Jubal Early, Richard Ewell, Wade Hampton, Benjamin Huger, Fitzhugh Lee, James Longstreet, and William Mahone with treason. Also indicted were James A. Seddon, Henry Wise, John Breckenridge and George W.

[52] Johnson, *Reports of Cases,* 13-14.

Alexander, the commandant of the notorious Castle Thunder Prison in Richmond. A review of the list of men indicted makes the process appear haphazard at best. In all, the grand jury returned indictments against eighteen rebel leaders. Most prominent of the men, of course, was the commander of the Army of Northern Virginia, Robert E. Lee, who had just two months previously been paroled at Appomattox. It did not take long for the Johnson administration to realize that the indictments had opened up a highly charged controversy about the propriety of bringing charges against these men.

After the grand jury returned, Judge Underwood traveled to meet with Attorney General James Speed in June 1865 to talk to him about the indictments that had just been handed down against the high ranking Confederate leaders.[53] Prominently missing from the list was the Confederate President. The reaction of the Johnson Administration indicated how the lack of direction from the Executive Branch could seriously embarrass the new president. On June 20, 1866, James Speed wrote to Lucius Chandler about the newly indicted cases. "I learn that many of the rebel officers and soldiers that were paroled by capitulation have been indicted," he said. "I am instructed by the President to direct you not to have warrants of arrest taken out against them, or any of them, until further orders."[54] The meeting between Andrew Johnson, Preston King and Judge Underwood directing Underwood to secure indictments against Confederate leaders had resulted in the indictment of men, paroled by the terms of their surrender, and embarrassed the Administration. It should have come as no surprise. Because the

[53] *Alexandria Gazette,* June 12, 1865.

[54] James Speed to Lucius H. Chandler, June 20, 1866, *Impeachment Investigation,* 512.

government provided no direction as to who should be indicted, the grand jury could be excused for returning indictments against the prominent military leaders of the Confederacy instead of the politicians who had led the South out of the Union. Davis would remain in military custody until a decision was made on how to proceed against him.

If the prosecution of rebel leaders was haphazard and disorganized, Andrew Johnson was also alienating radical congressional leaders by his efforts to rapidly bring the rebellious states back into the union. Thaddeus Stevens wrote at the end of May 1865 that "I see our worthy president fancies himself a sovereign power."[55] Within six weeks, his anger boiled over in a letter to the president himself. "I am sure you will pardon me for speaking to you with a candor to which men of high places are seldom accustomed. Among all the leading Union men of the North with whom I have had intercourse I do not find one who approves of your policy,"[56] he said to Johnson. Pleading with him to wait until Congress was back in session before making important decisions, he asked, "can you not hold your hand and wait the action of Congress and in the mean time govern them by military rulers?"[57] Radical Republicans found Johnson's actions intolerable but could not get back into session until the next session, since they were dependent otherwise on the President calling them into special session. They seethed as they watched and waited.

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[55] Thaddeus Stevens to William D. Kelley, May 30, 1865, Thaddeus Stevens, *The Selected Papers of Thaddeus Stevens*, 2 vols., Beverly Wilson Palmer, ed. (Pittsburgh: University of Pittsburgh Press, 1998), 2:6. [56] Thaddeus Stevens to Andrew Johnson, July 6, 1865, 2:7.
[57] Ibid.

The Unpopularity of Davis in the South

In the months after the war, Davis had another intangible problem with which he had to deal - he was not well liked even in the South when he began his imprisonment. It was under his watch that the South had been devastated by the Union armies. One correspondent wrote that "I have seen many persons from the South lately and they all agree in saying that the world has never seen a more subjugated or conquered people. Everyone is utterly and I fear irretrievably ruined. My own relations and friends were actually on the verge of starvation." He found Southerners to be of one opinion, - "they all blame Davis as the cause of their defeat."[58] General James H. Wilson also addressed the attitude of Southerners he encountered. "From the contempt they feel toward Davis government, the disgrace of its termination, as well as its tyranny while in force, they feel a sentiment of relief at the restoration of national authority."[59] Horace Greeley agreed with the sentiment expressed. He compared Southern treatment of Davis to an "idolater, who adores his god after a victory, but flogs him when smarting under defeat."[60] If the prosecution acted quickly and decisively in bringing Davis to trial, the unpopular Davis

[58] John (LNU) to Thomas F. Bayard, June 15, 1865, *Papers of Thomas Bayard*, Manuscript Division, Library of Congress.
[59] James H. Wilson to William D. Whipple, May 15, 1865, *O.R.*, ser. 104:783.
[60] Horace Greeley, *Recollections of a Busy Life,* (New York: J. B. Ford & Co., 1865), 412.

might have lacked support even in the South. All that was necessary was a clear direction from the government in what was to be done with the ex-president.

Arriving at Fort Monroe, Davis was relegated to await what might become of him. Would he be tried and executed? Would his fate be left in the hands of a military commission or would a civil court try him? Might he escape trial altogether? None of these questions had been answered in May 1865, but there is ample evidence that federal officials were discussing the options. Stanton's inveterate hatred of the Southerners who had led the rebellion and his attempt to manage every aspect of Davis' treatment and prosecution did not mean that he effectively controlled everyone who might have a hand in prosecuting the rebel chief. Despite Stanton's May 14th telegram that Davis would be tried in Virginia, the federal attorney for the District of Columbia had, apparently, not been made aware of that decision.

On May 26, 1865, the first indictments were handed down against Davis and John C. Breckinridge for treason. The Washington *Evening Star* reported that "the overt act was the raid in July last within the District of Columbia, and the jurisdiction of this court, killing citizens and destroying property, Breckinridge being present and Davis constructively so." A warrant was requested for Breckinridge. The District Attorney, E. C. Carrington, indicated to the court that he would request that Davis be brought to the District of Columbia for trial. The reporter advised that "the announcement produced no excitement in the court room, the indictment having been expected for some time."[61]

[61] *Evening Star*, May 26, 1865.

The New Jersey *Camden Democrat* ran a more detailed story on exactly what the indictments alleged. Davis was accused of being in league with a large number of insurgents as their commander-in-chief and attacking Fort Stevens in the District of Columbia on July 12, 1864 and killing and wounding United States troops "contrary to the duty of his said allegiance and fidelity to the United States."[62] The newspaper informed its readers that the court was expected to bring Davis to be formally arraigned in court within a few days. The indictment was secured less than three weeks after he was apprehended in Georgia. The federal prosecutor charged Davis with treason and sought a conviction based upon Davis' constructive presence in the District of Columbia during the 1864 Confederate attack. Constructive presence was, of course, a legal interpretation, permitting the finding by a jury that Davis was present in the District of Columbia despite the fact that he was not physically present at the time of the attack. He could be found to be constructively present by virtue of him being the Commander in Chief of Confederate forces and having ordered the strike. The indictment carried some risk in that Article III, Section 2 of the United States Constitution states that "the trial of all crimes... shall be held in the state where the said crimes shall have been committed."[63] Had Carrington even considered whether constructive presence was permitted in treason cases?

Anticipated or not, the indictment was considered problematic for some in the Administration. In late May, Stanton met with Joseph Holt in Holt's office. Holt was in

[62] *Camden Democrat,* June 3, 1865.
[63] U.S. Const. art. III, § 2.

the middle of the prosecution of Mary Surratt and the other Lincoln conspirators. Their conversation was brief but touched upon the question involving the treason indictments of Davis and Breckinridge just announced in the criminal courts of the District of Columbia. Could the two men be legally tried in the District of Columbia, they wondered? Stanton left the meeting without having expressed a definitive conclusion. However it weighed on his mind over the next week and he finally addressed the question in a lengthy letter to Holt.

Ten days after their meeting, in a letter dated June 7, 1865, Stanton wrote to Holt to express his now considered opinion as to the proper venue of a treason trial for Breckinridge and Davis. The original indictments of Breckinridge and Davis have since been lost to history but contemporary newspapers published the pertinent portions of the charging instruments. Stanton's discussion is relevant to subsequent measures taken by the government in the prosecution of Davis in Virginia. Stanton wrote that a trial of Breckinridge in the District of Columbia was proper because Breckinridge was actually present in the District when the overt act charged was committed. Stanton opined that "I do not understand that there is any controversy but the Court has rightful jurisdiction over him, <u>if they catch him.</u>"[64]

Jurisdiction over Davis, however, was a much thornier question. Stanton was troubled that if jurisdiction existed, it was to be had only on the basis of the "constructive presence" of Davis in the District during the time that the overt acts of treason were

[64] Edwin B. Stanton to Joseph P. Holt, June 7, 1865, *Joseph Holt Papers*, Manuscript Division, Library of Congress.

committed. But he was also concerned about the appearance of fairness in the process of trying Davis. "The trial of Jefferson Davis for treason will be a marked event in the Judicial history of the country. It is of vast importance that it should be conducted in such a manner as to meet the approval of the American Bar." Stanton clearly wanted to sustain the government's effort to prosecute Davis in the District of Columbia. However, he expressed his doubts on several points to Holt. He had reviewed the decision by Chief Justice John Marshall in the Burr treason trial and concluded that it was Marshall's holding that a person could not be convicted of treason unless the person was personally present within the jurisdiction of the court in which the overt act was committed. Moreover, Stanton had spoken to J. J. Coombs, a man he described as "probably the best lawyer in the District," and an author of a work on the Burr treason trial who had grave doubts about the jurisdiction of a District of Columbia court over Davis. Ultimately, Stanton claimed that it was the United States Constitution that required that treason be tried in the district where the crime was committed. The Secretary of War argued that "a jury might be found in Virginia, and the trial had at Alexandria, Norfolk or Richmond. And why not in Wheeling! He committed treason enough to hang a legion of men before the State of West Virginia was organized."[65]

Stanton was also concerned that Davis not be tried by a mere district judge. Instead, he argued that the former Confederate president should be tried before the Chief Justice of the Supreme Court. Evidently, he believed that the prestige of the office of the Chief Justice should be lent to the proceedings. But Salmon P. Chase, a highly ambitious

[65] Ibid.

politician known by Stanton to be a hopeless schemer and aspirant of the presidency, would be the man presiding over the trial. Did Stanton really trust Chase to oversee a trial so important to the federal government without his rulings being colored by his ambition?

The Secretary of War was silent in his letter about what to do with the United States Attorney in Washington. The controversy swirling around that officer certainly would have caused Stanton and Holt concern. The federal prosecutor, E. C. Carrington, a Virginian by birth, had been the subject of a congressional investigation into his loyalty during the Thirty-Seventh Congress of 1861-1862. Congress had investigated dozens of federal employees from virtually every federal department. Carrington's name was on the list of "those against whom the evidence of disloyalty was deemed conclusive." Carrington was reputed to have admitted that he was appointed District Attorney by virtue of having raised a company of men for the District of Columbia. However, when the company was ordered into Virginia, Carrington refused to go. According to witnesses from his company, Captain Carrington told the men in his company that "we were under no obligations to go - that we had only taken an oath to fight *in the District.*" His colonel testified that Carrington told him that he would not go into Virginia to fight but would defend the District of Columbia if it was attacked by the Confederates. Witnesses against him claimed that his reluctance to accompany his unit into Virginia stemmed from the fact that his mother was a resident of Virginia and his two brothers served in the rebel army. The committee found that Carrington's loyalty was doubtful and that he could "not be depended upon either to repress rebellion or to defend the

Constitution and laws, which he has, as district attorney, taken a solemn oath to support."[66]

Stanton did not address Carrington's loyalty in his letter to Holt. As a result, no conclusion can be drawn that the findings of the House Committee pertaining to the alleged disloyalty of the district attorney played a part in Stanton's reluctance to try Davis in the District of Columbia. There is no direct evidence that Stanton was aware of the claims made by the committee. Still, there were several military officers within the War Department who had serious allegations of disloyalty made against them in the same House Report that investigated Carrington. Stanton succeeded Simon Cameron as Secretary of War only a few days before the report was printed. He certainly would have reviewed the report as to his own department. The Secretary of War was also well known for his concern for the security of officials in Washington. Carrington would have been the chief law enforcement official in charge of prosecuting those who posed a threat to officials within the district. It is very likely that he would have seen the findings made against the United States District Attorney for the District of Columbia while studying the report. Could this have played a part in his belief that the treason trial of Davis was better left to be prosecuted by someone else in another jurisdiction? In May 1865, Stanton was, perhaps, the most powerful member of Johnson's cabinet. If he did not cede the decision however, the president would decide if and where Davis would be tried.

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[66] "Loyalty of Clerks and other Persons Employed by Government, January 28, 1862," *Reports of Committees of the House of Representatives made during the Second Session of the Thirty-Seventh Congress, 1861-'62,* (Washington: Government Printing Office, 1862), 80.

An indictment was pending in Washington, D. C. against Davis for treason and other crimes. Davis, however, had yet to even be arraigned on the charges. Instead, the Attorney General had presumably made the decision that the proper venue was Virginia and so declined to prosecute the pending charges in Washington. Meanwhile, Chase was said to not be contemplating holding court in Virginia for an indefinite period of time. Stanton's exasperation was understandable to anyone hoping for a speedy trial of the Confederate leader.

As Davis languished at Fort Monroe, the trial of the Lincoln conspirators came to a close. The trial had lasted for nearly a month. The conspirators were alleged, in Charge 1, to have aided, with Jefferson Davis, and others including Beverly Tucker and Clement C. Clay, in the murder of President Lincoln and the plot to kill Secretary of State William H. Seward and Vice-President Andrew Johnson.[67] Davis must have wondered what was in store for his future. Even after the end of the war, military commissions operated to quickly dispose of cases like the Lincoln conspirators. Union officers composed the members of military commissions, making the body less impartial than a civilian jury. It was presided over by a high ranking officer rather than a civilian judge, making the evidentiary rulings less likely to follow the rules of evidence. No decision had been made that would have eased the mind of the Confederate leader. What would he be charged with? Who would he be tried before? Would he receive a fair trial? These were all questions that understandably raised his anxiety and made life difficult for

[67] E. D. Townsend, General Court-Martial Order No. 356, July 5, 1865, *O. R.*, ser. 121:696-698.

the high profile prisoner of Fort Monroe. The struggle to answer the questions would occupy the energy of Davis's advocates and opponents in the coming months.

Open the case, and when you are doing it, talk to the jury as though your client's fate depends on every word you utter[1]*. – Abraham Lincoln*

Chapter 3

Great Lawyers and Brilliant Advocates

Within days of the capture of Davis, prominent lawyers began to vie to be able to work on his defense. The case was so publicized and the issues involved in the trial of the ex-Confederate president so novel, that it would come as no surprise that many lawyers were interested in defending him. And, given the great decisions that needed to be made by the government, and which might be influenced by a good defense attorney, the advocates realized that it would be advantageous to get on the case as early as possible. But Davis had a particular man in mind for the job. He had told his wife, Varina, while sailing north under arrest, that if they should be separated during the voyage that she should request that Charles O'Conor represent him.[2] O'Conor, a preeminent New York defense lawyer, was considered to be "an advocate almost without peer in his day,"[3] according to *Harper's Monthly Magazine.* Varina Davis was not able

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[1] Michael Burlingame, *Abraham Lincoln: A Life*, 2 vols. (Baltimore: The Johns Hopkins University Press, 2008), 1:347.

[2] Varina Davis, *A Memoir: Jefferson Davis Ex-President of the Confederate States of America,* 2 vols. (New York: Belford Company, Publishers, 1890), 647.

[3] Frederick Trevor Hill, *"Decisive Battles of the Law: The Hayes-Tilden Contest - a Political Arbitration,* Harper's Monthly Magazine, March 1907, page 560.

to contact the lawyer before she found that O'Conor had volunteered to represent Davis.[4] She must have been greatly relieved that he would be so interested in the case. This also signaled to the federal government that the accused Rebel would be given the highest quality defense.

O'Conor was sixty-one years old in 1865 and had reached the pinnacle of his profession in New York City. His prominence came despite his early years of poverty and lack of formal education. His grandfather and his family left Ireland, hoping to avoid persecution, after being involved in the Irish Rebellion of 1798. O'Conor was born six years later into poverty to this family of Irish immigrants.[5] The school that he attended for about two months as a child constituted the only formal education that he would ever receive. His mother died when he was eleven years old and he was then apprenticed by his father to a man who manufactured tar pitch, turpentine and lampblack, where he received no pay but was given his board. When he left this occupation at age 13, his father placed him with an acquaintance who held a rude and unprofitable law practice.[6] O'Conor, however, earned membership to the New York Bar in 1824 at the age of twenty and began a career that spanned nearly sixty years.[7] He changed the spelling of his name,

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[4] Varina Davis, *A Memoir: Jefferson Davis*, 2:647.

[5] Charles P. Daly, "Charles O'Conor: His Professional Life and Character," *Magazine of American History*, 13, no. 6 (June 1885): 513-535.

[6] John Bigelow, "American Lawyer; Some recollections of the late C. O'Conor, by John Bigelow (typescript)," Charles O'Conor file, The New York Public Library, 6-7.

[7] Charles O'Conor Memorials, (New York: New York Law Institute, 1884), 7.

dropping a letter "n" after a trip to Ireland convinced him that the original spelling contained only one of that letter.[8]

Known more for his prodigious work-ethic rather than the brilliance of his arguments, O'Conor attributed his success at the bar to one word: study.[9] His preparation for cases was legendary, himself once remarking that "I have not left a stone unturned under which there crept a living thing."[10] In a time when formal pleadings in lawsuits might make or break the success of a case, O'Conor considered every pleading filed by his adversary as potentially flawed. In many ways, he was not a likable man. His younger, but great professional adversary, William M. Evarts claimed that O'Conor was "endowed by nature with these prodigious gifts of intellect, of insight, of discussion, of manifestation, of oratory, and with the added power of industry, that if it was not born in him, was burnt into him by ten years of poverty and struggle at our Bar, had everything in his favor to make a great lawyer."[11] But he carried with him the resentment that being Irish and Catholic had needlessly placed obstacles in his path to success. Whether his youthful poverty and ethnic and religious background played any role in his developing a confrontational and often-times unsocial personality, is a matter of speculation. That he had this personality is undeniable. He "left in the minds of many the impression that he

[8] Daly, *"Charles O'Conor,"* 527.
[9] Ibid. 524.
[10] Charles O'Conor Memorials, 75.
[11] Ibid. Remarks of William M. Evarts, 44.

was a harsh, severe and unamiable man."[12] This truth was so obvious that even those eulogizing him at a memorial in his honor could not fail to mention it.

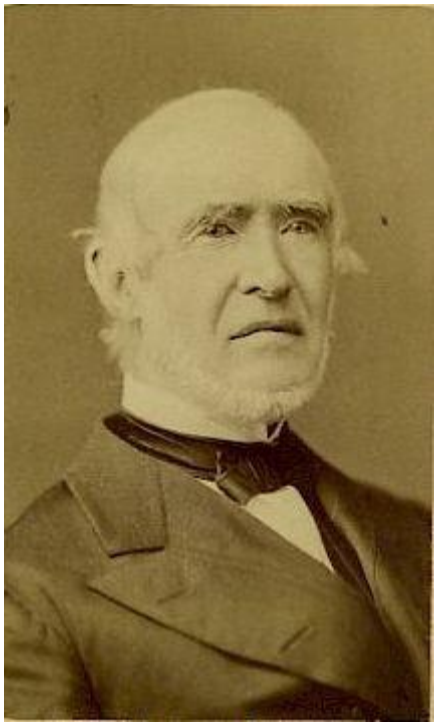

Illustration #4: Charles O'Conor

Through sheer hard work O'Conor very quickly attained prominence in the New York bar. A contemporary of his, Charles A. Peabody, also an attorney, found O'Conor to be supremely confident in his ability to present cases. "His courage, his fearlessness in attacking obstacles, was remarkable; nothing daunted or discouraged him. I do not think he knew such a feeling as fear or distrust of his case. He always felt himself equal to the attainment of justice."[13] His courtroom style included "a cutting irony and a power of

[12] Ibid. Remarks of James C. Carter, 30-31.
[13] Ibid. Remarks of Charles A. Peabody, 14

sarcasm that was at time withering. His manner was formal and his ordinary speech defiant."[14] Accounts of his demeanor before juries leave no doubt that he was a pugnacious fighter who enjoyed the confrontation that is inevitable in the trial of any case. In the best tradition of the law, O'Conor was acknowledged to keep the secrets of his clients. This reserve in preparing and presenting his cases was turned into a weapon at trial. He understood juries and determined that "the great lawyer is not the one who knows the most law, but who understands what the point involved is."[15] But personally, he could not avoid the isolation brought on by his anti-social behavior. Samuel J. Tilden, the future Democratic candidate for president, knew O'Conor well. "Mr. O'Conor is a man of extensive and accurate legal learning, of an acuteness of reason somewhat excessive even for the higher uses of his profession - of great mental activity - indefatigable, vehement and sarcastic in controversy - remarked at the bar as able rather

than wise, and remarkable for a want of tact."[16] He was seen as honest and able, but lacking the ability to be diplomatic or compromise on issues.[17]

Politically, he was well-connected in the Democratic Party in New York and held many of the conservative views of that Party. His youthful poverty and the challenges that he faced by being Irish and Catholic did not make him sympathetic to the plight of African-Americans, free or those held in bondage. During the 1850s he not only

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[14] Daly, *"Charles O'Conor,"* 526.
[15] Ibid. 529.
[16] S. J. Tilden to unknown recipient, Charles O'Conor file, January 15, 1853, New York Public Library, New York.
[17] See George Templeton Strong, *The Diary of George Templeton Strong: Post-War Years 1865-1875,* ed. Allan Nevins and Milton Halsey Thomas, (New York: The MacMillan Company, 1952), 435.

undertook representation of Southern causes in New York, but he also asserted the Southern position in his personal and political life. His view of slavery coincided with the most extreme Southern view of the institution. As the sectional crisis deepened, O'Conor advocated the Southern cause in New York City, answering the cries of abolitionists with a strident speech which he gave at the Union Meeting at the Academy of Music entitled *"Negro Slavery Not Unjust,"* which he subsequently had printed and distributed in pamphlet form.[18] Many in the New York Bar regretted the "powerful aid he has given the cause of slavery by his superior talents."[19] After the war came, he openly "condemned the prosecution of the war by the North,"[20] giving him views that placed him squarely in the Copperhead circle during the conflict.

His efforts on behalf of the Southern caused lost him many friends. When Columbia Law School considered honoring O'Conor with an LL.D., largely in hope that he would donate his considerable law library to the college, George Templeton Strong confided to his diary that many "seem unwilling that the College confer any academic

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[18] O'Conor, Charles, "Negro Slavery Not Unjust: Speech of Charles O'Conor, Esq., at the Union Meeting at the Academy of Music, New York City, December 19th, 1859," (New York: Van Evrie, Horton & Co., 1859). O'Conor was wealthy enough to have his cases self-published in a single edition of nearly one hundred leather bound volumes. This pamphlet is found contained in Volume 34 which includes the Lemmon Slave case, referred to later in this dissertation, and the slavery question generally. Also found in that volume is a copy of Abraham Lincoln's Cooper Union speech. Unfortunately for this dissertation, O'Conor's volume which would chronologically contain the Jefferson Davis case has been missing for years according to the New York Law Institute archivists.

[19] *New York Bar Magazine,* June 1865, 73-96, 89.

[20] Daly, *"Charles O'Conor,"* 532.

honor on any man who has been using his great talent and learning to weaken the national cause and to uphold the cause of secession and of slave-breeding, all through these years of war. I think Columbia College cannot confer academic honor on so maleficent a Copperhead as O'Conor, not even for the bribe of a cart-load of law books. I will not vote for it, anyhow."[21] No matter how good a figure he cut in the courtroom, his politics made him an anathema to many in the United States.

He did, however, make a formidable opponent in any case in which he appeared. He viewed litigation as a physical ordeal as well as a cerebral one. Shortly after volunteering to represent Davis, he wrote to his old friend, former president Franklin Pierce. "In order to put myself in good physical trim, a very important point in the preparation for an intellectual combat as well as for a prize fight, I design going to Saratoga Springs tomorrow."[22] O'Conor was a tough, intimidating trial lawyer and believed that keeping physically fit added to his ability to endure long, stressful trials. If the federal government vigorously prosecuted the Rebel leadership, O'Conor would need every ounce of energy that could be mustered.

In his letter to Pierce, he explained his reason for volunteering to represent the ex-Confederate President as well as the events that had transpired since he made his offer.

> When the newspaper reports indicated the near approach of a trial and as yet no one had volunteered to defend, I thought fit to intervene for the purpose of saving our (northern) country from the reproach of unanimity. On my request the War Department permitted an open note containing my tender to be delivered to Mr. Davis. But his reply was

[21] Strong, *Diary*, page 84 - 85.

[22] Charles O'Conor to Franklin Pierce, July 5, 1865, Franklin Pierce Papers, Library of Congress.

> perused by the Attorney General and pronounced an improper communication. It was consequently returned to him for correction. He has made no further attempt to correspond with me and my application for a personal interview with him is deemed inadmissible at present.[23]

Franklin Pierce was a "beloved old friend"[24] of Jefferson Davis, as well as a correspondent with O'Conor. Pierce saw the fight as more than simply a question of whether Davis had committed treason or some other crime. Writing to Jeremiah Black, he urged the lawyer to assist O'Conor in the defense. "I hope you will assist Mr. O'Conor in his defence of Davis," he wrote, "if not in Court by conference for it is not Mr. Davis alone but civil and constitutional liberty is on trial."[25] But primarily, Pierce sought help for a dear friend on trial for his life.

Nearly two months after his arrest, Davis sat in Fort Monroe, denied the assistance of counsel because the Attorney General for the federal government deemed it inexpedient for him to meet with an attorney. Whether Davis was to be tried before a military tribunal or a civilian jury, there was no reason why he should have been denied counsel. The clumsy handling of his incarceration would gradually make him a hero to Southerners and soften the attitudes of the Northern public.

O'Conor recognized that a collaborative effort was needed at the beginning of his defense. He admitted that "it is entirely impossible to divine what course may be adopted by the ruling powers. The signs of their interest are very various and it may task 'one

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[23] Ibid.

[24] William C. Davis, *Jefferson Davis: The Man and His Hour*, (New York: Harper Collins Publishers, 1991), 655.

[25] Franklin Pierce to Jeremiah Black, June 21, 1865, *Jeremiah Black Papers*, Manuscript Division, Library of Congress, Washington, D.C.

poor-head' to determine some questions that must be regarded as within the compass of possibility. I would like to call a counsel board together for consultation upon them."[26] O'Conor asked that Pierce help him put together a group of people to talk about Davis' case.

Across the Atlantic in England, Confederate representatives came forward to help Davis and the others charged by the United States government. James Mason wrote to O'Conor from London in June expressing gratitude that O'Conor had volunteered to handle Davis' defense and to place 500 pounds sterling at his disposal for the fees and investigative costs of mounting a defense for Davis. Mason wanted no corners cut in the case. "I am aware," he wrote, "that to conduct the defense properly, expenses must be incurred besides the fees of counsel, in preliminary preparations as regards obtaining rebutting or other evidence."[27] Mason also wanted a network of former Confederates to be located with the aim of helping Davis defer the expense of trial. To that end, he suggested that O'Conor talk to Davis about locating the Confederate agent to Canada, Jacob Thompson, for help.

The £500 yielded O'Conor about $3,500.00 and the defense lawyer received notice that a credit of £10,000 would be placed at his disposal from which he could draw for the Davis defense. By June 1867, O'Conor reported to Davis that he had cashed, and presumably paid himself, about $7,000.00 from that source. He also reported that the

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[26] Charles O'Conor to Franklin Pierce, July 15, 1865, *Franklin Pierce Papers*, Library of Congress.

[27] James Mason to Charles O'Conor, June 19, 1865, *James M. Mason Papers*, Volume 8, Library of Congress.

£10,000 line of credit had been withdrawn and replaced by five bills for £500 each, of which O'Conor had cashed one.

R. H. Gillett, another very capable New York attorney, was hired by friends of Davis to assist O'Conor in the defense of the indictment returned in May 1866.[28] He was described as "one of the most prominent lawyers and politicians north of Albany," by the New York *Herald* and was said by the same paper to rank "high as a criminal lawyer."[29] Supporters of the former Confederate president were moving quickly to assemble a very high quality defense team. The prosecution, however, was moving much more slowly.

Assembling the Prosecution Team

At the August 22, 1865 cabinet meeting, James Speed reported to the President that he was waiting to hear from private counsel that he intended to employ in the Davis prosecution. He had contacted William M. Evarts, a lawyer from New York, and John H. Clifford, an attorney from Massachusetts, to work on the case. Evarts was a distinguished lawyer in New York who, four years before, had been mentioned as a possible candidate to replace Seward in the Senate. A New Englander by birth, Evarts had amassed a large fortune as an attorney and had been an early Republican supporter of Lincoln. Speed had indicated to the lawyers that he would be taking the role of lead prosecutor in the case, with them being in a supporting position. In a case of this

[28] *New York Times,* June 7, 1866.
[29] *New York Herald,* August 28, 1865.

importance, Speed believed "that, as the highest law officer of the government, I should prosecute in person."[30] The President was apparently taken by surprise by the selection of these two men who were not known to members of the cabinet as strong trial lawyers. Gideon Welles thought that Speed had made the offers based on the recommendations of Stanton and Seward, whom he perceived to be the only members of the cabinet not surprised by Speed's presentation. Johnson reported that he had spoken to Chase about the time and place of the trial but that Chase had declined to discuss the subject with the President. It was the view of Welles that Benjamin Butler, who he believed was an outstanding trial lawyer, should have been brought on for the trial as well not only for his trial skills but also because "he belongs to a school which at this time and in such a trial should have a voice."[31]

Davis had quickly retained Charles O'Conor as his lead counsel, while the United States Attorney General was still trying to assemble a prosecution team for the treason trial. The delay seemingly did not affect the government's case *vis-a-vis* the defense since O'Conor had not yet even had a visit with his client; however, Davis had been in custody for three months and there was no sense of urgency apparent in the government's actions. Any prosecutor intent upon trying a case like Davis's would be cognizant that a delay in the case would work against the government's interest since the passage of time would inevitably draw attention to more pressing national problems and allow Northern hostility, now at a high fever, to reduce towards the Southern leader.

[30] Testimony of James Speed, *Impeachment Investigation,* page 800.
[31] Welles, *Diary*, 2:365-366.

Nevertheless, in August 1865, Evarts received a telegram from Speed asking that he come to Washington. During that visit, Evarts, Speed and President Johnson met about bringing Evarts on to assist in the prosecution. Evarts left with the impression that he was retained to prosecute not only Davis, but also any other rebel leaders who might be indicted for treason.[32] Historians have portrayed Andrew Johnson as a man unsure of what he was to do with Davis after the war. William J. Cooper, Jr., author of *Jefferson Davis, American,* advances this position, writing that the President was unsure how to proceed with the treason case.[33] This is not entirely fair. President Johnson wanted Davis brought to trial. Any delay was not due to Johnson's lack of clarity on that question. James Speed admitted that President Johnson was "anxious for a speedy and prompt trial of Jefferson Davis."[34] Johnson, however, deferred to his advisors in their field of expertise. Speed, as Attorney General, and his successors, recognized that the responsibility devolved upon them to prosecute Davis. The president made clear his wishes and did not intrude upon their prerogative as to time and place. He also backed his Attorney General on the choices he made for his trial team. If the failure to bring Davis to trial for treason ultimately must fall on the president's shoulders, his shortcoming lay in his not ordering that the trial begin by a date certain.

In the early stages of the prosecution, the government made an excellent choice in assembling the trial team. The man chosen by Speed to assist in the prosecution, William

[32] Testimony of William M. Evarts, *Impeachment Investigation,* 645.
[33] William J. Cooper, *Jefferson Davis, American,* (New York: Alfred A. Knopf, 2000), 541.
[34] Testimony of James Speed, *Impeachment Investigation,* 798.

M. Evarts, was characterized by another New York attorney as a "great lawyer and brilliant advocate."[35] The contrast between him and Charles O'Conor was dramatic. A man of medium stature and slim build, he was descended both from Roger Sherman, a signer of the Declaration of Independence, and an otherwise prominent family in Boston. He was a second generation lawyer. His education was first-rate. He graduated from Yale in 1837 and Harvard Law School. One of his classmates at Harvard Law School was Richard Henry Dana, Jr., a man who would join the Davis prosecution team. Dana characterized Evarts as one of Harvard Law School's "leading men" in terms of his ability to offer a "complete, systematic, precise and elegantly spoken law argument." He noted that "if he does not become distinguished, he will disappoint more persons than any other young man whom I have ever met with."[36] Thereafter, Evarts began his practice of law in New York City.

[35] J. Hampden Dougherty, "William M. Evarts, Lawyer and Statesman," *The American Lawyer: A Monthly Journal Serving the Interests of the Legal Profession in America*, (January 1902): 4.

[36] Richard Henry Dana, Jr., *The Journal of Richard Henry Dana, Jr.*, 3 vols. ed. Robert F. Lucid, (Cambridge, MA: The Belknap Press of Harvard University Press, 1968), 1:39-40.

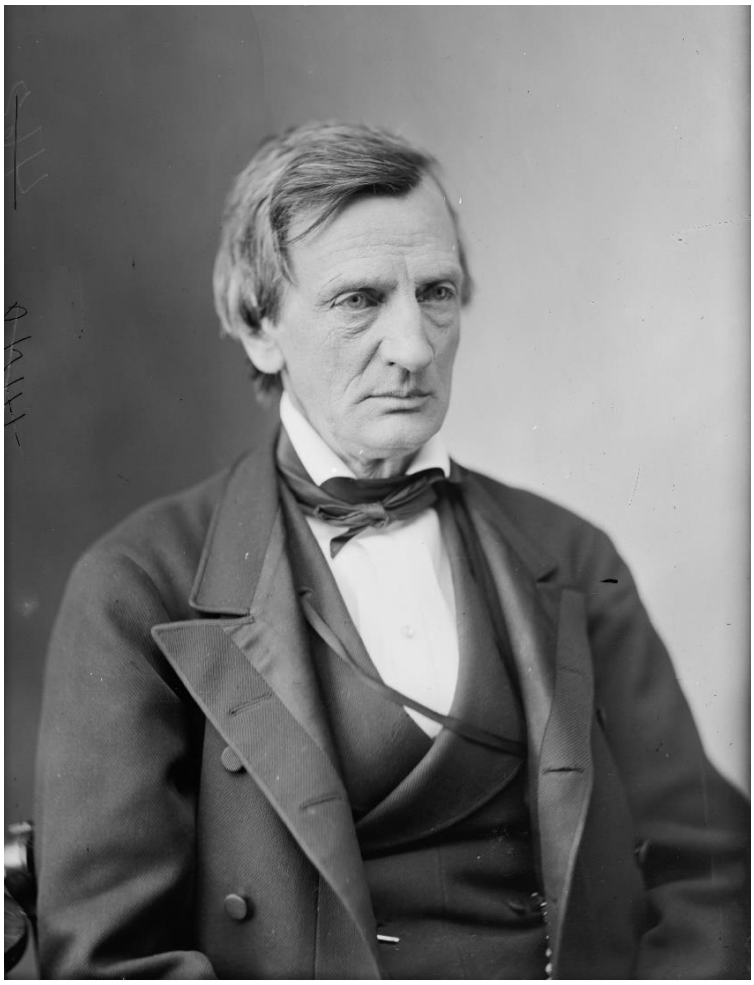

Illustration #5: William Maxwell Evarts

As Evarts himself later recalled, he "came to this city from the law school in 1839, and had the great advantage of being received into the office of the eminent and excellent lawyer who then stood at the head of professional employments in this city."[37] He was smooth where O'Conor was rough; he maintained the self-assurance born into a man confident in his place in society, where O'Conor grasped and clung to success with a fear that only great labor could save him from falling back into poverty and disgrace.

[37] Evarts, Charles O'Conor Memorials, 41.

And yet, Evarts believed that it was O'Conor's background which gave him advantage as an attorney, being "that the discipline of poverty and of necessity is the one best assurance for the making of a great lawyer and the gaining of the great fame and the great enjoyments accompanying success at the Bar."[38] Undoubtedly, O'Conor would have found this sentiment of a brilliant lawyer born into wealth and society, and imbued with high intellect and a first-rate education, amusing.

Like many lawyers, Evarts became involved in politics. He began as a Whig, initially in the Millard Fillmore wing of the party, before he moved to back the more progressive Whig leader, William Seward, then the governor of New York. The friendship between him and Seward would last until Seward's death. It was an association that greatly benefitted the younger Evarts. Subsequently, he was appointed Assistant United States Attorney by Fillmore's appointee, doubtless reaping the advantage of his skills and his contacts. After the passage of the Fugitive Slave Act in 1850, he joined Fernando Wood and others in speaking in support of the Act. This caused him no small problem with his claim to being an anti-slavery man, but as it was explained years later by another New York attorney, "Evarts, like Webster, was inimical to slavery but Union was to him more than the anti-slavery cause and hence he sought to

allay sectional irritation by urging obedience to an abhorrent law."[39]

As a prosecutor in the United States Attorney's Office for the Southern District of New York, Evarts made a name for himself when he tried a high profile case known as

[38] Ibid. 44.
[39] Dougherty, "William M. Evarts," 5.

the Cleopatra expedition to Cuba. The trial involved the prosecution of individuals who had undertaken an odyssey to Cuba in an effort to extend Southern slavery to a territory already a part of the slave culture. The Neutrality Act of 1818 prohibited vessels from being outfitted for war against countries with which the United States was at peace. In April 1851, Evarts became aware that recruitment of sailors and men was taking place in New York City and about to leave for the southern coast. The young lawyer had the leaders arrested and the ship detained while the case was prepared for trial. Nearly a year later, the case went to trial. Evarts lost the case, but gained public attention through the prosecution.

His reputation in the anti-slavery movement was recovered only after he undertook the *Lemmon* case by defending a New York statute that pronounced free every slave brought into New York voluntarily or by consent of the slave's master. Jonathan Lemmon and his family, citizens of Virginia, were traveling from Virginia to Texas with eight slaves when they stopped in New York merely to transfer ships to Texas in November 1852. During the stop, a writ of habeas corpus was issued for the eight slaves alleging that they were being unlawfully restrained in their liberty because by virtue of their having stepped foot in New York, they were free. A New York state court upheld the statute. The controversy created by this writ was immense and provocative to both sections of the country. Merchants of New York who were dependent upon Southern trade immediately raised $5,000 to compensate Lemmon for the value of his slaves.

Abolitionists led by Lewis Tappan raised hundreds of dollars to finance the relocation of the newly freed slaves to Canada.[40]

Pro-Southern newspapers derided activist judges, who, "instead of administering the law as they find it, they usurp the authority of the Legislature, and make law according to their notions of what it ought to be."[41] This opinion, of course, ignored the fact that the New York legislature had passed the very statute under which the slaves had been freed. Jonathan Lemmon returned to Virginia with the $5,000 and abandoned both his intended move to Texas and his pursuit of his legal claim to the slaves. In February 1857, when no one appeared at the appellate court on behalf of the Lemmons, the case was dismissed.[42]

The State of Virginia did not give up so easily. The next day, counsel appeared on behalf of Virginia and the case was reinstated on the docket. The Attorney General of the state began the prosecution of the appeal in the case and hired local counsel to represent Virginia on appeal. Many in the South were outraged by the lower court decision. Howell Cobb, the governor of Georgia, claimed to regard the 1852 decision as a "just cause of war."[43] The State of Virginia took the case to the New York Supreme Court, an appellate court, which heard the case in December 1857. By this time, the *Dred Scott* decision had been handed down by the United States Supreme Court. Southerners hoped that federal courts would next extend their right to take slaves

[40] *New York Herald*, January 26, 1860.
[41] *New York Herald*, January 26, 1860.
[42] *New York Tribune*, February 26, 1857.
[43] *New York Herald*, January 26, 1860.

wherever they chose. Southerners did not have confidence that a New York court would make that extension to the decision.

Thus, the State of Virginia fought the writ by hiring Charles O'Conor whose well-known Southern sympathies would assure that his legal positions would not be compromised by his personal views. Future president Chester Arthur was the attorney for the State of New York but William Evarts was hired as "of counsel" and argued the case before the appellate court. As they had in other cases before, Evarts and O'Conor locked horns on the case in October 1857. O'Conor urged the court to honor the property rights of the slaveholders while they were in New York. Evarts responded that the New York statutes "operate as a universal proscription and prohibition of the condition of slavery within the state."[44] By the time that the case reached the New York Court of Appeals for argument in January 1860, the nation was still trying to recover from John Brown's raid on Harpers Ferry just months before.

O'Conor's argument before the Court of Appeals went much further than the argument that slaves were property entitled to be transported through a free state as would any other property. "The cruelties of vicious slaveowners and the horrors of the slave trade are topics quite irrelevant,"[45] he told the judges. He argued, in part, that

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[44] Dougherty, "William M. Evarts," 6.

[45] Charles O'Conor, *My Own Cases: Lemmon's Slaves and Slavery Cases*, vol. 34, "The People of the State of New York, on the relation of Louis Napoleon v. Jonathan Lemmon, A citizen of the State of Virginia," In the Court of Appeals for the State of New York, 22, New York Law Institute, New York. Interestingly enough, also found in the volume compiled and bound by O'Conor is a pamphlet containing the Cooper Union speech by Abraham Lincoln.

"Negroes, alone and unaided by the guardianship of another race, cannot sustain a civilized social state," and "that, alone and unaided, he never can sustain a civilized social organization is proven to all reasonable minds by the fact that one single member of his race has never attained proficiency in any art or science requiring the employment of high intellectual capacity,"[46] an assertion completely outside the narrow legal question before the court. When confronted with the point that Great Britain freed slaves immediately upon them stepping foot on British soil, O'Conor responded, somewhat misleadingly, that the law did not apply to white men held as slaves so that "the air of England had not its true enfranchising purity till drawn through the nostrils of a negro."[47] Mocking the legal position advanced by lawyers from the State of New York, O'Conor attempted to insert the issue of social equality into the case:

> The moment an African-negro comes within the State of New York, he is elevated to the rank of a freeman; almost elevated to political equality - entirely so, indeed, if he have but a little speck of real property. He is elevated to political equality with the most favored of the Anglo-Saxon race; and but for a vulgar, but inveterate prejudice, he would also be elevated to social equality.[48]

O'Conor attempted to bait the judges into viewing the case from the perspective of race. Whether this was a posture that he prepared in advance and intended to take or whether he shifted his approach as the lengthy arguments advanced, is not known. What is known

[46] *New York Herald*, January 26, 1860.
[47] Daly, *"Charles O'Conor"* 524.
[48] O'Conor, *My Own Cases: Lemmon's Slaves and Slavery Cases,* 34:31.

is that he recognized that members of the audience, not to say perhaps even the judges, would find his assertions offensive, but undertook to advance them, nonetheless.[49]

Evarts limited his argument before the judges to the law pertaining to the case much more than did Charles O'Conor, perhaps because O'Conor was playing to a sectional audience, but also likely because Evarts' training and experience guided him in the direction of a more legalistic approach. The statutory law of New York prohibited slavery within the boundaries of the state. "It remains only to be considered whether, under the principles of the law of nations, as governing the intercourse of friendly States, and as adopted and incorporated into the administration of our municipal law, comity requires the recognition and support of the relation of slave owner and slave between strangers passing through our territory, notwithstanding the absolute policy and comprehensive legislation which prohibit that relation and render the civil condition of slavery impossible in our own society." He drew an interesting analogy for the court by arguing that the relationship between, such as "incestuous marriage or polygamy, lawful in the foreign domicile, cannot be held as a lawful continuing relation here."[50] Even assuming for the sake of argument that the movement of property could be governed in a manner argued by O'Conor, Evarts responded that "by the law of Nations, men are not

[49] O'Conor remarked to the Court that it was easy to argue points that were well received by onlookers, but that arguing a position that might be subjected to gasps from the audience took courage.

[50] *New York Herald,* January 27, 1860.

the subject of property."[51] A large audience listened to Evarts's argument in evident support for the propositions which he advanced.[52]

Evarts prevailed in the highly publicized and closely watched case. The reputation of both lawyers was elevated in the political circles in which they moved. On the one side was O'Conor fighting for the interests of the peculiar institution. On the other side was Evarts, seamlessly advancing the rights of man. The vehement arguments advanced by O'Conor endeared him to the slaveholding South and would not be forgotten after the war when Davis was in need of a preeminent trial attorney who truly believed in the cause of the South. The efforts of Evarts would not be forgotten when a brilliant Republican lawyer was needed to assist in the prosecution of alleged traitors after the war.

By the time of the Republican Convention of 1860, Evarts was "a leading Wall Street lawyer and one of the most eloquent supporters of the Sage of Auburn," his fellow New Yorker William Henry Seward said according to historian Michael Burlingame. [53] Evarts had won such a name for himself in the law and in politics, and his reputation for persuasive speaking was so well known, that he was chosen to nominate Seward for president in Chicago. During the war, Seward twice asked Evarts to sail to Great Britain to represent the interests of the United States. On the first occasion, it fell to Evarts to attempt to convince the British government to enforce its neutrality laws and prohibit the launching of gunboats intended for the Confederacy. On the second trip in 1864, Evarts

[51] O'Conor, *My Own Cases: Lemmon's Slaves and Slavery Cases,* 34:69.
[52] *New York Herald,* January 27, 1860.
[53] Burlingame, *Abraham Lincoln:* 1:605.

engaged the British on the progress of the war and the duties of neutrals, which he also undertook in a cross channel visit to France.[54] The missions that Evarts undertook to Europe during the war made his name prominent as a lawyer in the United States. It is not surprising, then, that when Speed sought assistance in the prosecution of Davis that Evarts, with backing by William H. Seward, would be brought on for that role.

By August 29th, Speed told the cabinet that Evarts, Clifford, and an attorney from Kentucky, Lovell Rousseau, had agreed to associate themselves with him for Davis' trial. Benjamin Butler was suggested as a co-counsel on the case. Speed did not dismiss the possibility of bringing him on-board, but the prospect of Butler proving to be an "unpleasant associate" became a topic of conversation. No one doubted his ability as a trial attorney but it was thought that his personality might prove to be alienating to other counsel. Speed was open to Butler but thought it prudent to consult the other members of the prosecution team.[55] Butler would never be brought on as counsel for the government. His exclusion, given how deeply despised he was in the South, and how polarizing he was, even in the North, was a sensible decision by Speed.

In early September, Charles O'Conor still struggled in the dark in the defense of Davis. He had earlier written James M. Mason, the former Confederate envoy to England, who from Great Britain raised money for the defense of Davis, that he expected Davis to be tried before a military tribunal. His view gradually changed, although he still had no final word on the question. He now believed, from information that he thought

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[54] Brainerd Dyer, *The Public Career of William M. Evarts,* (Berkeley: University of California Press, 1933), 62-77.
[55] Welles, *Diary*, 2:367-368.

"seems quite trustworthy," that the individuals "most likely to control action are opposed to any punishment. Their wish is to get rid of the matter; they are quite resolutely determined against using the 'military commission.'" O'Conor did not believe, at this time, that Johnson was entirely in charge of the government's policy. In the same letter he betrayed a hope that Davis might avoid trial altogether, but thought that if he had to face a jury it would be a "regular trial for treason in a judicial court." As would any good defense attorney, he considered what groups of people might prove influential to his client's benefit. Surprisingly, he believed that "the abolitionists are averse to any further infliction upon the persons of 'traitors.'" In his judgment, Andrew Johnson might prove an unlikely ally with abolitionists on this point, despite the animosity and lack of confidence between Johnson and the abolitionists. O'Conor thought that those seeking the punishment of Davis consisted of people, like Stanton and Holt, who had been involved in the Lincoln conspiracy trials, or those involved in what he termed, the "Surratt tragedy."[56]

Federal District Judge John C. Underwood

Judge John C. Underwood, the federal district judge for Virginia, was the man who would try Jefferson Davis, if it was determined by the federal government that Davis would face a civilian trial. Of course, this was dependent upon the Attorney General

[56] Charles O'Conor to James Mason, September 6, 1865, *James M. Mason Papers*, Library of Congress.

deciding that the theory of constructive presence was not applicable in a federal treason trial. Underwood had worked as an auditor in the Treasury Department under Salmon Chase during the Civil War and had been involved in establishing the Tax Commissioner's Board for the sale of the estates of rebels for nonpayment of direct taxes.[57] Underwood was more than just a Union man from the South. A social progressive, Underwood served on the board of directors of the Institute for the Education of Colored Youth in the District of Columbia, which had been established by Congress in 1863.[58] He was appointed Judge of the District Court of Eastern District of Virginia, comprising the area east of the Blue Ridge Mountains, in March 1863 while he

was in Washington, D. C.[59] The *New York Herald* commented that he was appointed "at the instance of Secretary Chase."[60] It was announced that the court would be organized on June 1, 1863 at Norfolk, Virginia. Underwood was a well-known anti-slavery man and the Northern press characterized his appointment as him being called "to administer justice among traitors who but a few years ago drove him from the state on account of his anti-slavery convictions."[61]

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[57] *Alexandria Gazette,* April 4, 1863, and *National Intelligencer,* September 2, 1863.
[58] *Hartford Daily Courant,* May 29, 1863.
[59] Edwin Bates to John C. Underwood, March 28, 1863, *John C. Underwood Papers*, Library of Congress.
[60] *New York Herald,* April 3, 1863.
[61] *Lowell Daily Citizen and News,* April 6, 1863.

Illustration # 6: John C. Underwood

The judge's political and social leanings had, in fact, caused him considerable trouble in Virginia. Originally from New York, Underwood had married into one of Virginia's first families and had become a well-respected planter and farmer in Clarke County, Virginia, one of the very northernmost counties in the state. His decision to attend the Republican Convention in Philadelphia and support John C. Fremont for president in 1856 caused a rupture with his neighbors in Virginia that eventually drove him from his home. He was one of only a handful of men from the South at the

Republican Convention and served on the resolutions committee. While in Philadelphia, Underwood made a speech at the Convention "enunciating the doctrines held by Washington and Jefferson on slavery."[62] He not only quoted Jefferson's statement that "he trembled for his country when he reflected that God is just," but also spoke of spending time at the table of James Madison and hearing the elderly man expound upon the evils of slavery.[63] Then, he embarked on a speaking tour of the North in support of Fremont, often assailing the negative consequences of slavery on the free white population of the South.[64] His efforts were widely reported in the nation's press and did not go unnoticed by his neighbors. They were not well received.

On July 26, 1856, many of the prominent citizens of Clarke County met at the courthouse to take action against Underwood. A Committee on Resolutions was appointed with sixteen members who resolved that Underwood had committed "an atrocious fraud" by attending the Republican Convention as a Virginia delegate when no citizen of Clarke County had ever authorized him to attend the convention in that capacity. The resolution accused Underwood of having made statements at the convention that would have earned him a "felon's reward," if true, and of conspiring against the South. Finding that Underwood stood "guilty of moral treason, at least, if not legal treason, against the Commonwealth of Virginia," for his speech at the convention, they sought to punish him *in absentia*. The men unanimously resolved that "we have no

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[62] *Springfield Republican,* July 8, 1856 and *New York Reformer,* July 3, 1856.
[63] *Salem Register,* August 20, 1863.
[64] *New York Herald-Tribune,* August 25, 1856.

respect for the sickly, morbid sentiment, which holds slavery to be a 'moral evil.'" The committee then resolved to not tolerate the presence of Underwood in their community any longer and "that if he dare return to reside, we will take steps to eject him - peaceably if we can, forcibly if we must."[65] Since his whereabouts were unknown, the men indicated that they would have their resolutions printed in Northern papers for him to be given notice of his eviction. By early December 1856, a letter from Ashby Turner addressed to Underwood was printed in papers throughout the North offering him personal protection only if he returned to Virginia to settle up his business with an eye to leaving the state forever. Turner closed with a thinly veiled threat: "should you persist in renewing your citizenship among us, we shall withdraw our protection and leave you to suffer whatever may follow at the hands of the community."[66] The *Portland Advertiser* wrote that Underwood, "laboring under the fearful hallucination that this is a free country, attended the People's Convention in Philadelphia; for which offence he has been ordered to leave the State."[67] While the nation watched the unfolding drama surrounding Underwood attending the Republican Convention, his neighbors were trying to force him out of Virginia for his advocacy of free labor and anti-slavery sentiments. His neighbors appeared to be oblivious to the hubris that their actions exhibited to the readers from the North.

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[65] *New York Herald-Tribune,* September 12, 1856, quoting *The Winchester Virginian*, August 5, 1856.
[66] *New York Tribune,* December 2, 1856, and *Cleveland Leader,* December 6, 1856.
[67] *Portland Advertiser,* July 8, 1856.

The outrage over his treatment spilled over into Congress. Philemon Bliss, a Republican congressman from Ohio, addressed Underwood's treatment from the floor of the House on January 15, 1857. As the debate intensified over the extension of slavery into the territories, Underwood had become a symbol of the intolerance of the slave South towards those within the borders of slave states who disagreed with slavery. Bliss reminded his colleagues that:

> there are also in the slave States native Republicans who have not forgotten the doctrines of the fathers, as well as Republicans who have fled the Old world to secure personal rights, and not 'Alabama plantations.; All these would speak, and write, and vote, as they think, but slavery forbids it. A citizen of yonder State, one whom I knew in my schoolboy days, and whom to know was to honor, who is, as he always was, clear-headed and true-hearted, who concentrates in his own person as great nobility of soul and more true love for the State of his long adoption, than whole districts of her dominant caste; this man became guilty of disloyalty to the slave interest. The poor around him found a friend, and one who sought to aid them in that career, that gives character to the free-State laborer; and instead of being surrounded with gangs of ragged and shirking slaves, the deficiency of whose thriftless labor must be supplied by the sale of their young men and women; he gave employment to the dependent free white, and was thus enabling them to overcome their doom. Thus enlisted in the elevation of labor, he was of course a Republican, and vindicated his principles by his action. This man, thus noble and true, not even suspected of violating any law, just or unjust, merely for the security of slave domination, is driven from his property and home, and thus are crushed his experiment of free speech, and his attempt to elevate free labor. Virginia, not he feels the blow; for the name of John C. Underwood will be honored when the State he would again restore to her her old position, will, if she persevere, soon be thankful for a place scarce above the least. And yet is there no trust for such as he and those he would bless? They may desire free territory as a refuge, but it is all needed for extending the empire of the desolating case, and Democracy knows them not.[68]

[68] *Daily Globe*, January 16, 1857, and *Wooster Republican*, February 5, 1857.

Underwood attempted to return to his home in Clarke County, Virginia, in February 1857. As he exited a railway car at Markham Station near his home, he was met by Turner Ashby, Dr. Thomas H. Fisher and a crowd of people. Underwood's wife, Maria, later wrote that Ashby "rushed out like a madman," at her husband, exclaiming 'Tar and feathers - let's give him a coat of tar.'" Dr. Fisher took issue with Mrs. Underwood's rendition of the facts. He wrote that "upon seeing Mr. Underwood, he [Ashby] was much excited, and in reply to a remonstrance from me, said to me in an audible voice, but not to the crowd, 'don't you think we ought to give him a coat of tar.'"[69] The distinction that Dr. Fisher drew was one without difference. Stating that Ashby made the statement audibly, but not to the crowd, would be of no significance when the wife of the man that he suggests should be tarred and feathered is within earshot. Whether Ashby attempted to incite the crowd against Underwood or not, it was clear that his return to Virginia would be troubled. Despite his protestations that he continued to be "a citizen of Virginia, and a temporary sojourner"[70] in New York, Underwood determined that "my life, to say the least, would be exceedingly insecure"[71] if he remained and he soon sold much of his property and moved away from Northern Virginia.

Underwood's expulsion from Virginia did not end his efforts to change the lives of his former neighbors. From his new home in New York City, he was elected Secretary

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[69] Letter to the Editor of the Evening Post from Thomas H. Fisher, *Evening Post*, New York, N.Y., March 4, 1857, page 3.
[70] *Alexandria Gazette*, October 16, 1857.
[71] *Evening Post*, January 5, 1867.

of the American Homestead and Emigration Company, an organization which raised over $200,000 in less than half an hour after its books were opened.[72] The Company was formed to encourage the emigration of free men into Virginia, an effort that the Board of Directors hoped would infuse free soil men into the border states of the South by making wholesale purchases of large tracts of cheap land and selling that land to actual settlers for small farms. The *New York Herald* in announcing the formation of the Company attributed the homestead movement as "but one of the accidents consequent upon the passage of the Kansas-Nebraska bill."[73] The Southern press viewed the Company as a serious threat to the region. The *Daily Advocate* in Baton Rouge, Louisiana, warned that "immediately our land will be filled with vagabonds and paupers of every description" and urged the people of Virginia to "hasten to repel the invasions of Abolitionism before it is too late."[74]

Underwood read papers and gave lectures to anti-slavery audiences in an effort to educate the Northern public, traveling from New York to Portland, Maine.[75] He also became involved gathering subscriptions, for no wages, in Eastern States for the publication of a tract called *Helper's Impending Crisis of the South*.[76] When he appeared before The Compensated Emancipation Society and spoke against the compensated emancipation of slaves as immoral, instead arguing that the estimated billion dollars be

[72] *Massachusetts Spy,* May 13, 1857.
[73] *New York Herald,* May 11, 1857.
[74] *Daily Advocate,* August 27, 1857.
[75] See *Evening Post,* February 17, 1857, and *St. Albans Messenger*, September 1, 1859.
[76] *Liberator,* July 29, 1859.

spent to educate poor whites, the Southern press published an account of his appearance and noted that "the meeting is regarded as unfavorable to the plan of compensated emancipation."[77] His activities were closely monitored by an anxious citizenry in his home state.

After the Virginia border was electrified by the John Brown raid, Underwood became the subject of intensified scrutiny. Governor Henry Wise was telegraphed a rumor of an armed invasion by 250 men near Berry Ferry, Virginia, near Underwood's former home. Wise immediately dispatched a military force of 40 men and two cannons to repel the invasion. Armed citizens and the Clarke Guards joined the force and conducted a search of Clarke County and the homes of individuals thought to be anti-slavery. According to the *Berryville Virginia Conservator,* the militia "searched several houses - among them the unoccupied tenement of the notorious John C. Underwood - but found nothing worthy of consideration."[78] It was apparently lucky for Underwood that no one was home as the paper reported that "upon application for entrance into the house of a known Abolitionist, the wife of the man living there (her husband being absent) seized an ax and defied their entrance. They finally wrested the weapon from her grasp, but not without first giving her a bayonet wound on the arm."[79] As tensions rose, men like Underwood faced serious threats to their lives and property in Virginia. When Virginia seceded from the Union on April 17, 1861, Underwood remained in the North working for the federal government. On March 28, 1863, Attorney General Edward

[77] *Charleston Mercury,* January 31, 1859.
[78] *New York Herald-Tribune,* December 6, 1859.
[79] Ibid.

Bates sent Underwood a commission appointing him Judge of the District Court of the United States for the Eastern District of Virginia.[80] Underwood was a deeply disliked man by the white secessionists in Virginia.

A Radical Republican Judge in Northern Virginia

Underwood's tenure as judge began in controversial fashion. In November 1863, he approved the forfeiture of real and personal property of fifteen rebels, including three men who had previously served in the United States Navy but joined the Confederate Navy after the beginning of the war. Underwood interpreted paragraph two of Article 3, Section 3 of the Constitution which provides that: "The Congress shall have the power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted."[81] His interpretation of the constitutional provision found that the word "except" meant "unless." If a person was found to be treasonous and was still alive, his property was subject to confiscation. The Southern press expressed no surprise that this decision could be made by "a notorious Abolitionist,"[82] while the New York Herald presumed that "the subject, in some shape or other, will be brought before the Supreme Court of the United States, as its approaching term, for a final decision; and, as upon its interpretation of that one word, 'except,' will

[80] Edward Bates to John C. Underwood, March 28, 1863, *John C. Underwood Papers*, Library of Congress.
[81] U. S. Const. art. III, § 3.
[82] *Richmond Examiner*, December 7, 1863.

depend the inheritance or confiscation of thousands of millions of Southern property, the decision will be a matter of supreme importance."[83] Judge Underwood's controversial ruling jeopardized the property of every rebel officer who had ever served in the United States military or naval forces.

Confiscation became a powerful tool in Underwood's court and he proved to be aggressive in cases involving rebels. In one instance, an attorney appeared to seek the reversal of a decree of confiscation against Dr. Orlando Fairfax, an Alexandria, Virginia resident. Underwood "informed the attorney, from the bench, that he would allow no appearance for any 'rebel' or 'traitor;' that this was the rule of his court as before that publicly announced, and that he had in every case ordered the appearance of counsel for, and the answer of 'rebels' to be stricken from the files."[84] In fact, the record shows that Fairfax faced the same reception in three different cases in Underwood's court, with the same result. In his short tenure as a federal judge, Underwood proved himself ready to administer a harsh justice against rebels in Virginia, but he was admired in certain radical circles in the North.

Radical Republicans looked to Underwood's experience in Virginia in trying to determine how to address Reconstruction. The judge counseled the Joint Committee on Reconstruction against allowing the Democratic Party to become the dominant party, by combining the copperheads with the ex-rebel party in the South, and by stressing that this would lead to a national "acknowledgment of the Confederate debt, and compensation for

[83] *New York Herald,* November 27, 1863.

[84] *The Chicago Legal News: A Journal of Legal Intelligence,* February 3, 1877, Chicago, Illinois, 9:162.

their negroes."[85] By the war's end, Judge Underwood would not have been a magistrate before whom any rebel leader charged with treason would want to find himself. He made no secret of his views. Before any indictments were handed down, he had met with President Johnson and discussed the question of whether there should be prosecutions "of those who had been engaged in the rebellion, and he [Johnson] expressed himself very decidedly on the subject in favor of prosecution."[86]

The Richmond Examiner announced on January 11, 1866 that Jefferson Davis and other prominent Rebels were to be tried by a civil court. President Johnson, in response to a resolution of the Senate, transmitted reports of the Secretary of War and the Attorney General detailing the charges under which Davis was confined and why he was not brought to trial.

Lucius H. Chandler

Lucius H. Chandler was the United States District Attorney for the Eastern District of Virginia. Richmond, Virginia was within that district. If Davis was to be indicted and tried for treason in Virginia, Chandler would likely prove to be the United States Attorney in whose district the case would be tried. Originally from Maine,

[85] *The Journal of the Joint Committee of Fifteen on Reconstruction: 39th Congress, 1865-1867,* ed. Benjamin B. Kendrick, New York: Columbia University, 1914), 283.
[86] Testimony of John C. Underwood, *Impeachment Investigation*, 578.

Chandler, like Underwood, was a transplanted Yankee.[87] He had graduated from Colby University in Waterville, Maine at age 19. He married his wife, Susan, a young woman from Virginia, and had at least five children over a nine year span, all of whom were born in either Maine or Massachusetts. Eventually, the family moved to Virginia, a likely destination, given his wife's roots in the State.[88] Unlike Underwood, however, Chandler found himself in Virginia at the start of the war, having moved from Rockland, Virginia, where he had spent several years, to Norfolk.[89]

Chandler had not supported the Republican ticket in 1860. Instead, he had thrown his support behind Bell and Everett in the presidential election. Chandler had joined William M. Evarts as a speaker in New York for the election of the Union ticket.[90] After Lincoln's election and the secession of the South, he joined thousands in the Norfolk area of Virginia as a Union man during the war. Norfolk was a major naval base for the federal government and as soon as Gideon Welles was appointed Secretary of the Navy he began to replace much of the leadership of the base. Chandler, as a Union Party man, traveled to Washington, D.C. in an attempt to convince Welles to retain many of his friends.[91] Despite meeting with mixed success, he was clearly trying to use his political influence to advance the interests of his friends and himself in Northern Virginia.

He had an interest in politics that had led him to run for the United States House of Representatives on more than one occasion. He won a seat in the House from the

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[87] *Boston Journal*, July 26, 1876.
[88] United States Census for the City of Norfolk, Virginia, 1860, 69.
[89] *Daily Eastern Argus*, April 20, 1863.
[90] *New York Tribune*, October 24, 1861.
[91] *Alexandria Gazette*, April 16, 1861.

second district in Virginia in the election of May 1863, garnering 778 votes out of 779 cast. His election was not immediately recognized as legitimate and his bid to be seated was referred to the Committee of Elections and an investigation was had into the vote. Nearly a year after his electoral victory, the Committee made findings that kept him from occupying the seat. In short, the Committee found that the second district comprised eleven counties but votes were only cast in Norfolk County while "all the other counties composing this district, except that of Norfolk, were either under the entire control and occupation of the rebels, or so nearly so that no man could go to the polls in safety, if any had been opened for the reception of the votes."[92] The congressional conclusion was "that in no proper sense can the vote in one county be treated as the choice of the other ten counties, prevented by the strong arm of the rebellion from expressing any wish at the ballot-box,"[93] Chandler was denied a seat in the 38th Congress. Until he took on the Davis prosecution, Chandler, who was characterized as a brilliant orator, was perhaps best known for his speech in the failed defense of his seat which was described as "a magnificent argument"[94] by the *Richmond Whig*. Whether it was magnificent or not, he was not able to sway enough votes to be seated.

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[92] *House of Representatives, Report No. 59,* 38th Congress, 1st Session, April 25, 1864.

[93] *Cases of Contested Elections in Congress from 1834 to 1865, Inclusive,* House of Representatives, Miscellaneous Doc. No. 57, 38th Congress, 2d Session, Washington, Government Printing Office, 1865.

[94] *Richmond Whig,* September 22, 1865. See also, *Speech of Hon. Lucius H. Chandler of Virginia, in the House of Representatives of the United States, in Defence of his Claim to a Seat in that Body for the Thirty-Eighth Congress, (reprinted from the Congressional Globe of May 21, 1864).*

Chandler may have failed in his bid to become a United States Congressman, but he still held the post of Consul for the United States at Matanzas, a municipality and province in Cuba[95] that he had held since being nominated in 1861 and confirmed in February 1862.[96] His name was soon before the Senate for confirmation as Lincoln's nominee for the post of United States Attorney for the Eastern District of Virginia, a position that would assume oversized importance in comparison to other United States Attorneys in the post-war period. Charged with the prosecution of Davis and other rebel leaders under indictment in Virginia for treason was a responsibility of immense moment. Nominated on June 18, 1864,[97] he was referred favorably by the Senate Committee on the Judiciary only nine days later[98] and confirmed three days later.[99]

At age 52, Chandler began work as the United States Attorney for the Eastern District of Virginia under very unusual circumstances. As a result of the rebellion, the number of attorneys who were licensed to practice in the Court in Richmond, even in November 1865, was reduced to Chandler and one other attorney. Every other attorney was disqualified by virtue of an inability to take the "iron-clad" oath, the loyalty oath required by the United States government for prospective members of the bar. When the constitutionality of the oath was argued before the federal court, the lawyer arguing that it

[95] *Daily Eastern Argus*, April 20, 1863.
[96] *Journal of the Proceedings of the Senate of the United States in Executive Session,* Thirty-seventh Congress, second session, December 23, 1861, 27, and *Philadelphia Inquirer,* February 20, 1862.
[97] *Journal of the Proceedings of the Senate of the United States in Executive Session,* Thirty-eighth Congress, first session, June 20, 1864, 590.
[98] Ibid. June 27, 1864, 626.
[99] Ibid. June 30, 1864, 636.

was unconstitutional was a recently elected Virginia State senator who was not even licensed to practice in federal court.[100] Chandler, by virtue of being in the United States Attorney for the Virginia district encompassing Richmond, had the Davis treason prosecution land on his desk.

Many lawyers, recognizing that prosecuting the president of the Confederacy would make their reputation as an attorney, would have aggressively pursued the professional opportunity. Not so with Chandler, who "felt all along, that it was quite important that I should know what the views of the administration were in reference to the trial of Mr. Davis."[101] Chandler went to Washington to speak to President Johnson on two or three occasions to determine whether he thought the case should be tried. According to Chandler, each conversation with Johnson ended with Chandler not getting a very clear answer to that question. Instead, he felt that Johnson merely referred him to the Attorney General on the important matter.

The United States Attorney was not completely comfortable proceeding with the case and the hesitancy that he displayed in his approach to the case would cause problems from the beginning. While it is impossible to ascertain the precise reason for his hesitancy, there are several possibilities that stand out. First, the prosecution would be unpopular with the former Confederates amongst whom he lived. It is often difficult for some lawyers to proceed with a case that negatively affects their personal lives. The Davis prosecution certainly fell into this category. Since he had run for Congress,

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[100] *Cleveland Leader*, November 17, 1865, and *New York Herald*, November 16, 1865.

[101] Testimony of Lucius H. Chandler, *Impeachment Investigation*, 503.

Chandler must have recognized that his political aspirations would be compromised by the trial. However strong these reasons might have been in assessing the foundation for his tentative start, however, the historical record points to a lack of professional confidence and competence on Chandler's part. Fear of failure causes many lawyers to recoil from handling major cases. Chandler appears to fall into that category of advocate. Finally, heading an office that was so small meant that every decision devolved upon his shoulders. It was a difficult post to occupy.

One of Chandler's duties as the United States Attorney ordinarily would include the presentation of the evidence to the Grand Jury investigating Davis and others. A federal grand jury in Richmond, Virginia had been convened by Judge Underwood to determine whether Confederate leaders had committed the crime of treason. If they found probable cause to believe that the crime had been committed, then they would issue a document, called an indictment, which would serve as the charging instrument at trial. As a function of that role, it would be Chandler's responsibility to draft the indictment on behalf of the men comprising the Grand Jury.

A true bill indictment for treason against the former President of the Confederate States of America was filed with the United States District Court in Richmond, Virginia on May 10, 1866.[102] The indictment was returned nearly eleven and a half months after a grand jury had indicted the eighteen former Confederate leaders in early June 1865. Of interest is that all the earlier indictments, except one, were printed with blanks for the

[102] See Appendix B for the language of that indictment.

names and other identifying information to be hand-written into the indictment; however, the body of the indictment alleging the crime of treason was identical for each individual charged. This was significant because it reflected a failure by Chandler to draft an indictment against each Confederate leader that charged each accused person with the specific acts that they had committed that constituted treason.

Cases of this magnitude should never have been brought with boiler-plate, or fill in the blank, charging documents. An indictment should have formed the roadmap for the treason prosecutions. Chandler should have prepared them carefully, alleging the facts that he was confident the evidence would support in each person's treason trial. For example, the acts that Robert E. Lee committed in leading the Army of Northern Virginia and which allegedly constituted treason would have been much different than those committed by Robert Ould, who was in charge of prisoner exchanges for the Confederacy. A well run criminal investigation and prosecution would never have resulted in the use of form indictments in these high profile cases.

The Grand Jury in June 1865 chose not to indict Davis. According to Judge John C. Underwood, several of the members of the Grand Jury indicated to him that they did not indict Davis because he was already under indictment in the District of Columbia.[103] The lack of coordination by the Attorney General and the local district attorney and district judge resulted in Davis remaining uncharged in Virginia when indictments were returned for other prominent rebel leaders. There was little explanation for why Davis

[103] Testimony of John C. Underwood, *Impeachment Investigation*, 578-579.

was unindicted for a full year after James Speed had decided that Virginia was the proper venue for a treason trial.

Johnson's view that the most prominent persons engaged in the rebellion should be tried for treason did not waiver during 1865. Despite Chandler's later protestations to the contrary, the evidence also indicates that Johnson conveyed this stance to the individuals involved in the case. Judge Underwood remembered having two or three conversations with the president during which Johnson stated this position. While Johnson did not tell government officials how to do their job, he made clear what his administration sought to accomplish. Underwood understood this and did nothing to undermine the ability of the government to put Davis to trial. The judge's support of the administration extended even to the subtle ways that could have eroded the prospect of Davis being executed.[104]

One seemingly innocuous act that would hamper the ability of Davis to be hanged would be for the judge to grant him a bond. Releasing Davis on a bond would have sent the message to the nation that the judge did not consider Davis to be a dangerous individual. Underwood was approached with an application for bail for Davis shortly after the indictment was handed down in June 1866. At that time, Attorney General James Speed appeared personally before Underwood arguing against a bond being set in the case. Underwood refused the request for bail and Davis was retained in custody.[105]

[104] Testimony of John C. Underwood, *Impeachment Investigation,* 579.
[105] Ibid.

Even in the latter part of August 1865, the prospect of trying Davis that year seemed remote. Obviously, an indictment would have to be secured before a criminal case could be commenced, but that was an obstacle that could have quickly been overcome. But the Attorney General said that no court could be held in Virginia before November and with the Supreme Court session beginning so soon thereafter, there would not be time enough to try Davis in 1865.[106] R. H. Gillett, one of Davis' counsel, wrote to *The Albany Argus* that "Mr. Davis has no more information concerning his trial than others have." He released part of a letter from Jefferson Davis to him in which Davis claimed to Gillett that "I am still ignorant of the charges against me, the source of them, and the tribunal before which I am to answer. Your letter gave me the first notice of the Washington indictment." In the letter, Davis apparently enjoined Gillett to speak to O'Conor so that they might be ready for trial. The *New York Tribune* noted that "a direct application to the proper department asking to be informed, if not improper, when, where and before what tribunal Mr Davis is to be tried, remains unanswered, because, as is supposed, neither has been actually determined by the President."[107]

As the logistics of trying Davis were discussed, President Johnson told the cabinet that Chase had called on him only the day before and seemed less reluctant to talk about what the Chief Justice had felt was an off-limits topic only days before. He complained about the congressional decision to order that courts sit at Norfolk, Virginia, instead of Richmond, the former being a much more inconvenient location. Welles suggested that

[106] Welles, *Diary*, 2:368.
[107] *The New York Tribune*, August 23, 1865.

Speed talk to Chase about holding a special session of the court before the scheduled fourth Tuesday in November. Speed agreed to broach the subject with Chase, but the feeling amongst the cabinet was that there was little prospect for an early trial. Welles wrote in his diary that "I have seen no indications of a desire on the part of the Chief Justice to preside at the trial of Davis."[108] Welles had worked extensively with Chase while they both served in Lincoln's cabinet. His perception was correct.

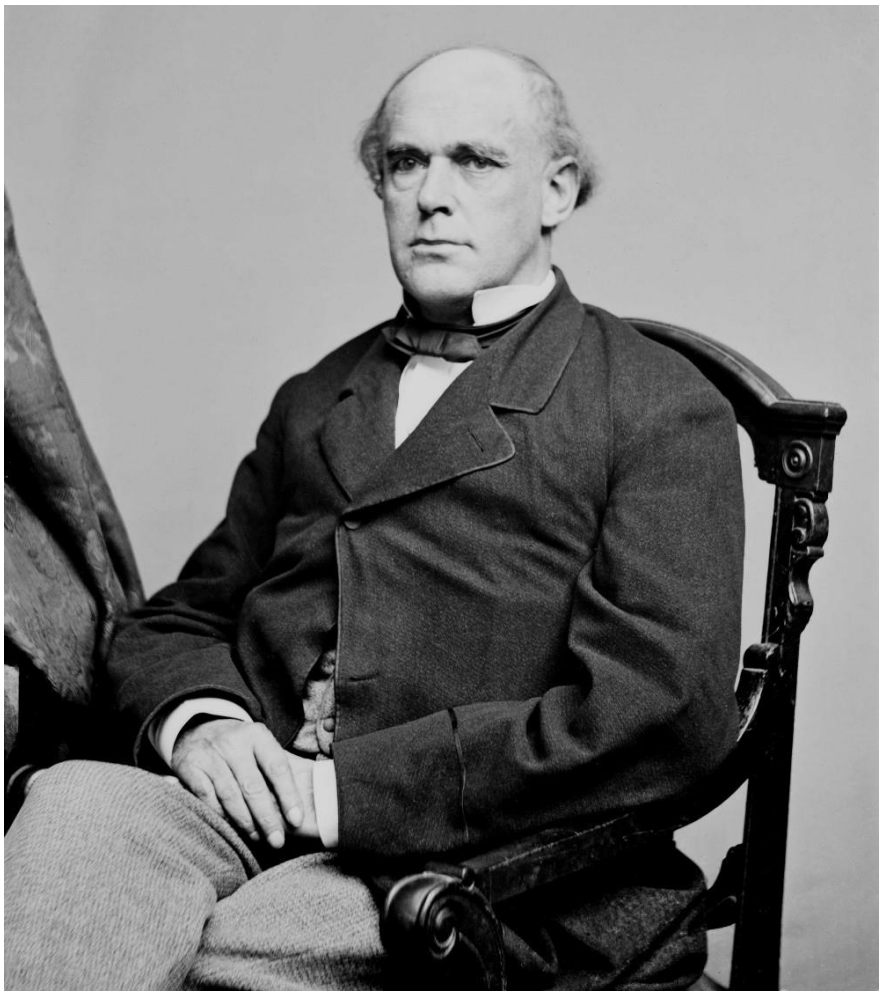

Illustration # 7: Salmon P. Chase

[108] Welles, *Diary*, 2:368.

Two of the nation's most prominent lawyers were now engaged in the Davis treason trial. With Evarts and O'Conor once again squaring off against each other, both the conservative and radical elements of the political spectrum were well represented. It was expected to be a highly publicized trial with significant constitutional implications to be played out before a deeply interested public. The parties appeared to be very motivated to try the case, relying on advocates that would leave no evidentiary stone unturned. The reputations of both lawyers also guaranteed that they would make compelling presentations of their differing perspectives of how the constitutional questions involved in a treason trial after the war.

In hindsight, it is easy to see that bringing Davis to trial on a treason charge would prove to be a herculean task. But, as noted, it was visible to Gideon Welles in August 1865. The Secretary of the Navy had been closely involved with Salmon Chase for years. He knew his character and understood the immense political ambition that motivated the Chief Justice. With the proper preparation, there was no reason why Davis could not be tried in 1865. Andrew Johnson made clear his decision that Davis should be tried for treason, but failed to mandate a time or place for the trial. Instead, he left those details to James Speed who was no match for Chase in forcing the case to trial. So long as the Administration held the position that the Chief Justice should preside over the trial, it conceded to Chase the decision on when to hold the trial. No one appears to have suspected that he had no intention of ever trying the case.

Their sufferings, and what is called the inhumanity of their treatment, were in great measure an unavoidable necessity.[1] *– Alexander H. Stephens*

Chapter 4

We Would Rather Die Than Go To Andersonville

Delays in the expeditious handling of criminal cases after the war were not ordinarily found. The Davis was the exception to that rule. Four months after the end of the war, a military commission began proceedings against Captain Henry Wirz, the Swiss-born commander of the notorious Andersonville prisoner of war camp. Historians writing about the trial of Henry Wirz fail to see a connection between it and the Jefferson Davis treason case. The attorneys defending Davis saw the dangerous parallel of the cases and worried very much about it. In August 1865, as Davis sat in Fort Monroe, isolated from his family and friends and denied access to counsel, the Wirz trial portended badly for him. The federal government had moved quickly to bring Wirz to trial. Despite evidence that originated in Georgia and witnesses who were scattered after the war, an indictment had been handed down in Washington only weeks after Davis' capture. The federal government's prosecution appeared to be well organized and intent upon punishing the rebels.

[1] Alexander H. Stephens, *Recollections of Alexander H. Stephens,* Edited by Myrta Lockett Avary, (Baton Rouge: Louisiana State University Press, 1998), 233.

Illustration # 8: Henry Wirz

Two issues significant to Davis, Lee and other Confederate leaders took a troubling turn for the rebels. First, Wirz appeared before a military commission in trial, not a civilian court and jury. Second, of consequence especially to Davis, the trial was being held in Washington, D. C., not in Georgia where the crime was alleged to have been committed. The questions of venue and forum were critical to the Davis trial. If Wirz could be tried before a military tribunal there seemed to be little reason why the Commander in Chief of the Confederate armies could not be tried in the same manner. However, if Davis could be tried before a civilian court and jury, he certainly would prefer to be tried in the South, rather than in the North. Just as critically, the prospect

existed that Davis would be charged with the crimes committed at Andersonville. If that occurred, then the defense faced the prospect of an immediate trial of Davis. In late summer 1865, these questions were still unanswered. That Wirz faced trial in Washington, D. C. before a military tribunal must have caused Davis much anxiety about his own future as he became accustomed to his prison cell at Fort Monroe. The factual basis for the Andersonville prosecution had some ugly facts for any accused person to address.

The maltreatment of Union prisoners of war generally, and the abuses found in Andersonville, Belle Isle and Libby prisons in particular, had long horrified the population of the North. Published accounts of the appalling treatment of Union soldiers were common. After the war, it was estimated that one Massachusetts soldier died at Andersonville prison for every five Massachusetts soldiers who died in battle.[2] During the war, Congress appointed a committee to investigate the growing evidence and rampant rumors that Union soldiers were subject to shocking abuse. Simultaneously, another organization was involved that might be able to shed some light on the camp. The United States Sanitary Commission, a humanitarian and philanthropic organization which relieved "our men in rebel prisons whenever it is permitted to do so,"[3] regularly issued reports on Confederate prison camps during the war that informed the Northern public about the horrible conditions of many Southern prisoner of war camps. Families

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[2] *Report of the Commission on the Andersonville Monument,* (Boston: Wright & Potter Printing Co., State Printers, 1902), 18.

[3] "Statement of the Object and Methods of the Sanitary Commission," *Documents of the Sanitary Commission, Vol. II, Numbers 61-95,* (New York: Wm. C. Bryant & Co., Printers, 1863,) 69:45.

lived in fear that their captured sons, fathers, or husbands, would end up in a place like Andersonville. Established on February 24, 1864, Andersonville prison camp rapidly became known in both the North and the South as a hell hole.[4]

Samuel White, representing himself as "an old man" who "could do nothing," wrote President Lincoln on behalf of his son, a husband and father of two, from Rushford, New York. He wrote a letter that reflected the fears and uncertainties of thousands of others in the North.

> One of my boys, who is a prisoner of war in the hands of the enemy, and who was last heard of from on Belle Isle, is now supposed to be in Andersonville, Ga., if living, suffering for want of food and clothing. . . . Winter is approaching, and my son and 30,000 more brave soldiers must perish unless the Government should relieve them by bringing about an exchange. ... [H]umanity prompts me to lay the case before you, hoping that if an honorable negotiation for an exchange of prisoners cannot be made with the infernal rebels, I would suggest that a sufficient force be immediately detailed, and Kilpatrick or some other brave officer sent to liberate from captivity the brave soldiers now confined in the State of Georgia. . . . The rebel prisoners at Elmira in this State live better than many poor people. They have wholesome food and enough of it, and are well provided for in sickness. The contrast is great between these prisoners and ours. Mr. President, what can be done and what will you do to liberate them from this cruel bondage?[5]

The calls for action were not ignored, but did not result in the implementation of any effective measures.

The United States Christian Commission, a philanthropic agency, sought to reach the Union men held by the Confederacy and alleviate their suffering. George H. Stuart,

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[4] See Isaiah H. White to Daniel T. Chandler, August 4, 1864, *OR*, ser. 120:524.

[5] Ibid. Samuel White to Abraham Lincoln, September 12, 1864, ser. 120:816.

Chairman of the Commission, wrote Secretary Stanton on October 31, 1864 asking if the North would agree to an exchange of delegates with the South to allow both sides to visit their own held in the opposing camp's prisons. The request was forwarded to Grant for his thoughts. He responded that "I see no impropriety in granting permission to the commission to send a certain number of good Christian men to make the attempt within proposed, and if successful I know of no special reason why proper Christian agents from the South should not [be] permitted to visit and administer to rebel prisoners in our hands."[6] Southerners were not quite so open to the idea of inspections of these facilities by Northern groups.

The North's attempts to initiate inspections of the prison camps failed. Soon, another organization, the United States Sanitary Commission, began an independent investigation. In 1864, the Sanitary Commission published its findings in the *Narrative of Privations and Sufferings of United States Officers and Soldiers While Prisoners of War in the Hands of the Rebel Authorities.* The pamphlet was 283 pages in length and contained photographs of emaciated Union soldiers, testimony from witnesses to the murder and abuse of prisoners and medical reports from the Commission's staff.[7] Significantly, Libby Prison and Belle Isle were in Richmond, Virginia, capital of the Confederacy, and residence of Davis. The Confederate president might plausibly plead

[6] Ibid. Ulysses S. Grant to Edwin M. Stanton, November 29, 1864, ser. 120:1074-1075, brackets in the original.

[7] "Narrative of Privations and Sufferings of United States Officers and Soldiers While Prisoners of War in the Hands of the Rebel Authorities," (Philadelphia: Printed for the U. S. Sanitary Commission, King & Baird, Printers, 1864).

ignorance when it came to the conditions at Andersonville because it was located in Georgia, but he could not do that for Libby Prison or Belle Isle.

Libby Prison was generally understood by the North to be a prisoner of war camp designed for officers of the Union Army, although it also was used to house other soldiers. In badly overcrowded conditions, the men found themselves robbed of their clothing and blankets upon arrival at the prison. They were then housed in an area that was poorly ventilated and ill-heated in the winter. Camp rules prohibited prisoners from going within three feet of windows and those who ventured too close were shot without warning. The food provided to these men, according to the investigation, was putrid and spoiled, often filled with worms and maggots. But the reports of exposure and starvation lent themselves to apologists who claimed that Southern soldiers suffered from the same problems. The North could not be certain at this stage of the war whether the abuse was planned and systematic or simply the result of a Confederacy in which soldiers, civilians and prisoners of war suffered alike. The evidence offered by the Sanitary Commission of murder gave muscular expression to those who believed the cruelty was intentional. Testimony by former prisoners of brutal and unrestrained guards pepper the publication, but evidence of this nature was not confined to this report. Men who came home from these prison camps published their own accounts of their treatment. Northern civilians became familiar with the term "dead-line," a point "beyond which no

one was allowed to pass, without being immediately shot by some of the sentries in the boxes."[8]

The conclusion of the Sanitary Commission report was that abuse of United States soldiers was so pervasive that it could only be attributed to a policy sanctioned by the very top of the Confederate leadership.

> No supposition of negligence, or thoughtlessness, or indifference, or accident, or inefficiency, or destitution, or necessity, can account for all this. so many and such positive forms of abuse and wrong cannot come from negative causes.
>
> The conclusion is unavoidable, therefore, that 'these privations and sufferings' have been 'designedly inflicted by the military and other authority of the rebel government,' and cannot have been 'due to causes which such authorities could not control.'[9]

Rumors about the treatment of prisoners at Andersonville terrified Northern families. In August 1864, General William Tecumseh Sherman wrote his wife Ellen from his headquarters near Atlanta, Georgia, saying that "I have already lost Stoneman and near 2000 Cavalry in attempting to rescue the Prisoners at Macon. I get one hundred letters a day almost asking me to effect the exchange or release of these Prisoners." He candidly confessed to her that "it is not in my power."[10] Although Sherman had witnessed carnage throughout the past four years, the knowledge that Union soldiers might be starving just miles from his headquarters led him to take a chance he would not

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[8] *A Voice From Rebel Prisons; Giving an Account of Some of the Horrors of the Stockades at Andersonville, Milan, and other Prisons, by a Returned Prisoner of War*, (Boston: Press of George C. Rand and Avery, 1865), 8.
[9] "Narrative of Privations and Sufferings," 95.
[10] William T. Sherman, *Sherman's Civil War: Selected Correspondence of William T. Sherman, 1860-1865,* ed. Brooks D. Simpson and Jean V. Berlin, (Chapel Hill: The University of North Carolina Press, 1999), 685.

have normally taken in an attempt to relieve these soldiers. Two days later, Sherman wrote to Thomas Ewing of Lancaster, Ohio. He admitted that "I have made no professional mistakes but one, in consenting that Stoneman should make the premature attempt to reach our prisoners of war at Macon & Anderson & release them. Stone begged for it & I consented, my judgment being warped by our Feelings for 20,000 poor men penned up like cattle."[11]

The conditions at Andersonville were well documented within the Confederate government. Within five months of its establishment, Andersonville prison officials reported deaths of 4,585 Union soldiers. In March of 1864, there had been 7,500 prisoners housed at Andersonville. In April, there were 10,000, in May 15,000, in June 22,291 and by July there were 29,030 Yankee prisoners of war housed in the Confederate military prison. In July alone, there were 1,817 deaths. In a report dated August 2, 1864, the Chief Surgeon of the Post, Isaiah H. White, reported that the hospital accommodations were insufficient, medical supplies deficient, and "during the entire month of July the commissary has been without funds." White reported that scurvy was rampant within the densely crowded prison and that "the lack of barrack accommodation exposes the men to the heat of the sun during the day and to the dews at night, and is a prolific source of disease." Despite these conditions, White attributed the "chief cause of mortality" to be the "mental depression produced by long imprisonment." White also noted that the "deposit of fecal matter over almost the entire surface of this bottom land," which he attributed to the lack of facilities. Ultimately, he blamed the prisoners

[11] Ibid. 690.

themselves, citing "the filthy habits of the men."[12] Two days later, White reported to his commanding officer, General John H. Winder that "the prisoners are without barracks or tents, 30,000 men being densely crowded together, sheltered only by blankets and low hovels densely and irregularly arranged."[13] General Winder, writing the same day, to an Assistant Adjutant-General, Lt. Col. D. T. Chandler, complained that the prison, which was initially meant for 6,000 men and was later expanded to accommodate 10,000 men, now had over 32,000 Union soldiers.

Illustration # 9: Andersonville Survivor

[12] Isaiah H. White to Daniel T. Chandler, August 2, 1864, *OR*, ser. 120:524-525.

[13] Ibid. Isaiah H. White to John H. Winder, August 4, 1864, ser. 120:541-542.

Lt. Col. Chandler submitted a report to Colonel R. H. Chilton, an Assistant Adjutant and Inspector General, in the Confederate capitol, the next day. Chandler's lengthy report forms some of the most damning evidence against the Confederate leadership. He described an area of 540 by 260 yards that formed the prison. A "dead-line" of 20 feet from the perimeter and about 3.25 acres of marshes near the center of the prison reduced the usable area for the 32,000 men to 23.5 acres. A small stream that ran through the enclosure furnished the only water available to the men, but Chandler reported that the guards' camp, the bakery and the cookhouse, which utilized the stream before it entered the prison "render the water nearly unfit for use before it reaches the prisoners."[14] The area used as toilets was found to be "in a shocking condition and cannot fail to breed pestilence." Chandler also noted that "the sanitary condition of the prisoners is as wretched as can be." He wrote that "no shelter whatever, nor materials for constructing any, has been provided by the prison authorities, and the ground being entirely bare of trees, none is within reach of the prisoners." The men were left to utilize a blanket as best they could for shelter. "Of other shelter there is and has been none," Chandler said. There was no medical access within the stockade. At the daily sick call, Chandler witnessed crowds so great that only the strongest could push their way to the front while the weakest, and those in most need of treatment, could not make their way to the front.[15]

[14] Ibid. Daniel T. Chandler to R. H. Chilton, August 5, 1864, ser. 120:546.
[15] Ibid. 547.

During his inspection, Chandler found that twenty deceased men were carried from the stockade. The dead were carted out daily with no effort to ascertain their cause of death. Most, he reported, had never been seen by medical staff. Chandler wrote that the hands of the dead were mutilated with an ax to remove any rings they wore. As to the living, there were no barracks or tents, and "no soap or clothing has ever been issued." Despite the claim that the lack of food was unavoidable, Chandler stated that "after inquiry I am confident that by slight exertions green corn and other antiscorbutics could readily be obtained." He found that most of the medical staff accepted their positions "to avoid serving in the ranks" and were "generally very inefficient; and not residing at the post, only visiting it once a day at 'sick-call.' They bestow but little attention to those under their care."[16]

On October 31, 1864, the Surgeon in Charge at Andersonville, R. R. Stevenson, wrote to General John H. Winder that during the month of October there were 1,595 deaths at Andersonville. Remarkably, Stevenson stated that "there has been a marked improvement in the health of the prisoners" during October. Winder forwarded the report to the Adjutant and Inspector General.[17] These reports made their way up the chain of command. J. A. Campbell, an Assistant Secretary of War, sent the report to the Confederate Secretary of War with the notation that "these reports show a condition of things at Andersonville which calls very loudly for the interposition of the Department in

[16] Ibid. 547-548.

[17] Ibid. R. R. Stevenson to John H. Winder, October 31, 1864, ser. 120:1076.

order that a change may be made."[18] The appalling conditions at Andersonville were clearly known to Jefferson Davis's wartime cabinet.

Andersonville Prosecutors Attempt to Link Davis & Lee to the Crimes

Colonel N. P. Chipman, Judge Advocate of the Military Court, prosecuted the Andersonville case at the behest of both Secretary Stanton and Joseph Holt. His investigation of the deaths of over 13,000 Union soldiers at Andersonville convinced him that "the heads of the rebel government were largely responsible for the awful suffering" at the prison camp. Colonel Chipman wrote that it was not until he had spent "months in searching out proofs, and arranging the facts, that this suspicion deepened into conviction."[19] Many Southerners saw the commandant of Andersonville prison as a victim of Yankee vengeance. One correspondent referred to him as "poor Capt. Wirz," and wrote that "he appears to have no friends, and a Confederate without money or friends has but a slim chance for justice or acquittal in a Federal Court."[20]

Former Confederates perceived a more sinister reason for the Wirz prosecution commencing prior to the Davis trial and being held before a Military Commission. C. J. McRae wrote to Davis' attorney, Charles O'Conor, that the tribunal and timing of the

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[18] Ibid. J. A. Campbell to Secretary of War [James A. Seddon], endorsing the report dated August 5, 1864 of D. T. Chandler, ser. 120:551.
[19] N. P. Chipman, *The Tragedy of Andersonville: Trial of Captain Henry Wirz, the Prison Keeper*, 2nd Ed., (Sacramento: published by the author, 1911), 27-28.
[20] C. J. McRae to James M. Mason, September 9, 1865, *James M. Mason Papers*, Volume 8, Library of Congress.

Wirz trial "induces the belief that Capt. Wirz has been selected as the subordinate officer to be convicted and capitally punished in order to establish a precedent for a like conviction and punishment of more eminent persons."[21] McRae hardly evidenced any concern about Wirz personally. Instead, he confided in O'Conor that "it is deemed of the utmost importance that Capt. Wirz's case hereto be properly managed, and I take the liberty of writing to request that you will add to the pains already conferred on us to see that Capt. Wirz has able counsel and that his case is so managed as not to damage those of persons that may be hereafter tried . . ."[22] To that end, McRae authorized O'Conor to use a portion of the money sent to him for Davis' defense to help Wirz in his trial. O'Conor was cautioned to not reply directly to James Mason, but to send any reply through the channels that had been established for their correspondence. Clearly, they believed that their mail might be compromised if the American government officials became aware of the identities of the correspondents.

By the beginning of August 1865, the Wirz prosecutor was certain that Davis, Lee, and many other top rebel leaders bore responsibility for the atrocities at Andersonville. Unlike the conclusions of the Sanitary Commission, Chipman would need to present evidence that supported the allegation that the responsibility for the abuse emanated from the top of the Confederate government; widespread pervasiveness of deplorable conditions would not suffice to prove guilt in a military tribunal.

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[21] C. J. McRae to Charles O'Conor, September 9, 1865, *James M. Mason Papers*, Volume 8, Library of Congress. This letter to O'Conor was copied by McRae and sent to Mason.
[22] Ibid.

With the indictment in hand and the belief that he had proof to support his allegations, Chipman read aloud the document charging Robert E. Lee and other Confederate leaders as co-conspirators with Henry Wirz for the deaths of 13,000 Union soldiers at Andersonville. The first charge alleged a conspiracy between Wirz, Lee, James Seddon and others to "injure the health and destroy the lives, by subjecting to torture and great suffering, . . . large numbers of federal prisoners, soldiers in the military service of the United States of America."[23] After the arraignment of Wirz, the Commission recessed until the following day when Colonel Chipman intended to begin presenting evidence. The electrifying allegation that Robert E. Lee was linked to the horrors of Andersonville was telegraphed around the country and provided front page news the following day. Evidently Chipman thought that he had the concurrence of Stanton and Holt in charging the Confederate leadership. He did not.

The next day, as the Commission reassembled, Chipman received an order from the War Department dissolving the military court and ordering him to report immediately to the War Department. The reason behind this stunning order only became clear when Chipman arrived at the War Department and found an "unusually disturbed" Edwin Stanton, angry at Chipman's indictment of the rebel leadership in the Wirz case. Although Chipman had had extensive conversations with Joseph Holt, Stanton was apparently unaware of Chipman's intentions to include the Confederate leadership amongst the parties charged in the Andersonville case. Stanton ordered Chipman to re- indict Wirz, and leave out the names of Jefferson Davis, Robert E. Lee, James A. Seddon

[23] *New York Herald*, August 22, 1865.

and other leading rebels. While Joseph Holt was intimately aware of the nature of the evidence that Chipman had garnered against the Confederate leadership, Chipman believed that Stanton was not. Chipman was downcast at the prospect of not having this evidence come to light at trial. Now, relegated to trying only Wirz, a man whom Chipman found to be "of comparatively small consequence," Chipman believed that the government had lost a chance to bring to light war crimes that led directly to the desk of Davis.[24]

Stanton now decided to personally intervene and approve any new indictment filed by Colonel Chipman in the Wirz case. Chipman brought the same language to the new pleading, omitting the names that he had been required to delete, adding names of individuals of less note, and inserting the words "and others unknown," to the conspiracy count. The hurried changes allowed the trial to begin August 23, 1865. But Stanton was unaware that his decision to require the dismissal of the Rebel leadership from the Andersonville trial may have been the last opportunity to try Davis and Lee for their actions during the Civil War. Of course, these were not allegations of treason against these two men. Still, Colonel Chipman had put together a case that he was confident would expose Confederate leadership to judgment. Chipman had a military commission ready to try the case, he had evidence assembled that he believed supported his allegations and he had the willingness to try the case to judgment. At no other time would the United States government again have a court, a prosecution team and evidence ready at the same time to try Davis or Lee.

[24] Chipman, *The Tragedy of Andersonville,* 28-30.

The military tribunal was held in the basement of the nation's capital in the Court of Claims. Fresh from his stint as a member of the nine man commission that had tried and condemned the Lincoln conspirators, Major General Lew Wallace, headed the Commission. A slight man of about five feet, eight inches in height and only about 135 pounds, the accused had a very thin face with a full beard. He wore a black coat, vest and brown pants. He was, in the words of the *Boston Daily Advertiser*, "scorned, loathed, despised, hated of all men and women"[25] as his trial began. There is little wonder why the North hated Wirz. Many men held at the camp recounted the same horrors. One veteran, Charles Tibbles, testified that when tracked down by hounds and threatened with death by rebel guards, he and other escapees told the rebels "to shoot; that we would rather die anyhow than go to Andersonville."[26] Wirz sat with his legs crossed as the charges and specifications were read in court. The *Boston Daily Advertiser "*wondered that there was no outraged soldier to take the law into his own hands, and shoot the miserable creature as he walked with his guard or sat on the luxuriously cushioned lounge between his counsel."[27]

The tribunal found Wirz guilty as charged. The "Findings and Sentence" of the court implicated others. The sentencing court found that

> "Wirz, did combine, confederate, and conspire with them, the said Jefferson Davis, James A. Seddon, Howell Cobb, John H. Winder, Richard B. Winder, [and others] who were then engaged in armed rebellion against the United States, maliciously, traitorously, and in

[25] *Boston Daily Advertiser,* August 24, 1865.
[26] Testimony of Charles E. Tibbles, Chipman, *The Tragedy of Andersonville,* 347.
[27] *Boston Daily Advertiser,* August 24, 1865.

> violation of the laws of war, to impair and injure the health and to destroy the lives, by subjecting to torture and great suffering, by confining in unhealthy and unwholesome quarters, by exposing to the inclemency of winter and to the dews and burning suns of summer, by compelling the use of impure water, and by furnishing insufficient and unwholesome food, of large numbers of federal prisoners."[28]

Wirz was sentenced to be hanged. But, of course, the significance to Davis was that he was linked by a military tribunal's finding that he conspired to commit the crimes at Andersonville.

Speculation abounded in Washington that Johnson would commute Wirz' death sentence.[29] That rumor was quickly quashed when, in the first week of November, Johnson approved the death sentence of Henry Wirz and ordered that his execution be carried out on November 10, 1865.[30] Wirz's counsel, Louis Schade, immediately requested and was granted an interview with President Johnson. During that meeting, he intimated to Johnson that he should commute the sentence of Wirz by claiming that the physical health of the man was so fragile that he would perish of natural causes within six months. Apparently because of the presence of others at the meeting, Schade thought that it was better that he not press Johnson for a direct answer to the request. Johnson told the lawyer that he would consider the matter.[31]

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[28] *Executive Documents of the House of Representatives, 40th Cong., 2d sess., Ex Doc. No. 23, Trial of Henry Wirz*, (Washington, D.C.: 1867), 805.
[29] *Hartford Daily Courant*, November 1, 1865.
[30] *Daily Constitution Union*, November 6, 1865.
[31] *Daily Constitution Union*, November 8, 1865, and *New York Herald*, November 9, 1865.

Two days before his scheduled hanging, Henry Wirz granted an interview to the *New York Herald*. The prisoner's quarters were found to be closely guarded, day and night. His right arm, which he said had been hurt by a shell in the battle of Fair Oaks, was in a sling. His sore arm did not appear to hamper his willingness to talk about himself. He claimed to be a tailor's son from Switzerland. At the time of his trial, he was 41 years old. He emigrated to the United States in 1849, and his work took him from New York to Connecticut and eventually to Kentucky, where he married. Prior to the war, he had overseen a plantation in Natchez, Mississippi.

Wirz joined the Rebel army in August 1861 as a private. His first duty was as a guard at a military prison in Richmond, Virginia. Early in the war, he was noticed by General Winder and given assignments that were better carried out by an officer. He claimed to have been made assistant adjutant-general to Joseph Johnston and was wounded by a shell at Fair Oaks. When he recovered, he was eventually ordered to Libby Prison in Richmond in early 1863. "I did not like the way in which prisoners were treated, as they did not have enough to eat," he said. He asked for a transfer, but was denied. In March 1864, Wirz was ordered by General Winder to Andersonville to relieve W. S. Winder, General Winder's son. Shortly before the war ended, he was ordered to Richmond, where he remained until the surrender of the Confederacy.[32]

Wirz seemed reconciled to his execution. "As far as I am concerned, I have no hope of reprieve. These things which were done (meaning Andersonville) somebody must suffer for. I have never denied that the prisoners were mistreated; but it was not my

[32] *New York Herald*, November 9, 1865.

fault. If I am the last one that is to suffer death for the Southern confederacy I am satisfied. I do not fear death."[33] The newspaper correspondent described Wirz as "composed throughout" the interview and said that his statements were made in a "remarkably direct manner." The "command of thirty-five thousand men," which is how he described the position of Andersonville prison commandant, had "to be strict, but when I am accused of conspiring with Jefferson Davis and others it is all a lie," he said.[34] Rebel sympathizers would seize on these words by the condemned man as evidence of the innocence of Davis on the charge of violating the laws of war. However, Wirz did not clear Davis of these charges when he gave this statement. Whether Davis conspired with Wirz to commit these crimes, the President of the Confederacy was personally aware of the privations and did nothing to alleviate the suffering of these Union men. Davis implicitly approved the treatment of the prisoners of war. Despite his view that the sufferings of Union soldiers at Andersonville was "an unavoidable necessity," Alexander H. Stephens, the Vice-President of the Confederacy, made a simple yet damning statement about Davis's failure to act. Stephens wrote that "when I was satisfied of the inability of the Confederate Government to provide for its prisoners as humanity required, I wished them all (or at least all in such places as Andersonville) to be released and sent home on parole."[35] The solution to the suffering of Union prisoners was easy to determine and governed only by the dictates of the requirements of humanity. Davis did not act "as humanity required" towards these suffering Union men. Colonel Chipman

[33] Ibid.
[34] Ibid.
[35] Stephens, *Recollections,* 235.

lamented the lost opportunity to link Davis to the crimes that resulted in Wirz being hanged on November 10, 1865.

The attention of the nation would again turn to the prosecution of Davis. With the trials of the Lincoln conspirators and Captain Wirz now over, the remaining accusations were against the men indicted in Norfolk, including Lee and other military leaders, and those uncharged but incarcerated comprised of men like Jefferson Davis and men who held lesser civilian posts in the Confederate government. Since Lee had never even been arrested on a warrant pursuant to the indictment issued against him, it seemed very unlikely that the government would proceed against him. Others, like John H. Reagan, the former Confederate Postmaster General and close confidant of Davis, were released from imprisonment in mid-October 1865.[36] As the likelihood of prosecution diminished for others, Davis remained behind bars.

[36] Ben H. Procter, *Not Without Honor: The Life of John H. Reagan*, (Austin: The University of Texas Press, 1962), 174.

I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.[1] *– Thomas Jefferson*

Chapter 5

A Dire Calamity if Many Whom the Sword Spared the Law Should Spare

Jefferson Davis was unaware of the difficulty that the Johnson Administration was having in getting him to trial. All that he knew in late 1865 was that he was held in military custody without charges and without bail. Sitting in his cell, a modified casement at Fort Monroe, Davis was relegated to waiting for some action to be taken against him by the federal government. As is often the fear of prosecutors, the delay in bringing the treason charge to bar allowed time for the public perception of Davis to change. Over the coming months, the shift in public opinion would work to Davis's benefit.

It is safe to say that the majority of white Southerners believed that Davis was mistreated by his Union captors. Andrew Johnson was aware of the charge of maltreatment of Davis and took action to determine whether the accusation was true. Early in his incarceration, Davis was held in irons for several days. This news stirred the sympathy of people both South and North. Even Union General Benjamin Butler wrote

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[1] Thomas Jefferson to Thomas Paine, July 11, 1789, Thomas Jefferson, *The Writings of Thomas Jefferson*, 9 vols., Edited by H. A. Washington (Washington, D.C.: Taylor & Maury, 1853), 3:71. The full quote is "another apprehension is, that a majority cannot be induced to adopt the trial by jury; and I consider that as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."

that he regretted Davis being placed in irons. But he also moderated his position slightly. "I do not know how far I should have been stirred in the direction of putting Davis in chains had I stood beside the death bed of Mr. Lincoln as did Stanton."[2] Now, Johnson wanted to have trustworthy information on the subject. To find out, he asked his Treasury Secretary, Hugh McCulloch to travel to Fort Monroe to see for himself. The talk that Johnson had with McCulloch in asking him for a report on Davis did not mean that Johnson's feelings about the Confederate were softening. Davis "was the head devil among the traitors, and he ought to be hung; but he should have a fair trial, and not be brutally treated while a prisoner,"[3] Johnson told McCulloch.

Traveling in an unofficial capacity, McCulloch arrived at the fortress and found Davis walking upon the ramparts with two Union soldiers as escorts. Davis approached McCulloch in apparent good health. They spent a couple of hours conversing in Davis' cell. The quarters were sparsely furnished: a cot, a pine table and two cane-bottomed chairs accounted for the furniture, but Davis remarked that the furnishings were "such as a prisoner charged with high treason ought not to complain." McCulloch reported to Johnson that Davis "had not the appearance of one who was suffering in health by imprisonment."[4]

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[2] Benjamin Butler, *Butler's Book*, (Boston: A. M. Thayer & Co., 1892), 915.

[3] Hugh McCulloch, *Men and Measures of Half a Century: Sketches and Comments*, (New York: Charles Scribner's Sons, 1888), 410.

[4] Ibid. 409-410.

The backstairs efforts to force the military to accommodate Davis more comfortably reached the highest executives of the federal government. In the summer of 1865, Varina Davis undertook a writing campaign that requested favors from her friends to enlist their aid in inducing federal authorities to grant her requests for travel and access to her husband. "Enclosed please find a letter to Mr. Seward - read it and if it will not damage my hopes of leaving here, send it to him,"[5] she wrote to Francis P. Blair in July 1865. At other times, Varina Davis wrote directly to federal officers, as she did to Major General James B. Steedman, commander of the State of Georgia, asking, "may I appeal to you to use the very great influence which I hear you possess to obtain permission for me to go to the North." She was not above employing flattery: "So soldierly a man as I hear you are can readily appreciate the helpless and afflicted state of a woman," she stated to Steedman. Her letters were also filled with sentiments that appealed to Southern sympathies. "I long since offered to take any parole if permitted [to] go so near Mr. Davis as to hear daily of his health. I have entreated to share his imprisonment, and if not permitted to be in his prison, to be permitted to send a few words of all the many I would like to say to him."[6]

Francis P. Blair, Sr., the patriarch of the conservative, pro-Union family of Maryland, had long been a man to whose advice Presidents listened. Born during the Washington Administration, Blair's involvement in politics spanned many decades and

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[5] Varina Davis to Francis P. Blair, July 10, 1865, *Andrew Johnson Papers*, Library of Congress.

[6] Varina Davis to James Steedman, August 6, 1865, *Andrew Johnson Papers*, Library of Congress.

his influence as editor of the *Globe* during Andrew Jackson's presidency made him a part of Jackson's "Kitchen Cabinet." The Blair family had long held slaves, but F. P. Blair, Sr. became convinced that slavery should not be extended beyond its present borders and during the war, he freed his slaves. In 1860, his support eventually went for Abraham Lincoln during the presidential nomination process and his son, Montgomery, became a member of Lincoln's cabinet. Lincoln spent time at the Blair House, which is very near the White House, seeking advice from the elderly leader of the family. However, he remained a conservative voice in Washington, D.C. The friends of Jefferson Davis recognized Blair as a valuable ally in their attempts to persuade President Johnson not to prosecute Davis.

"Old Man" Blair used his access to Andrew Johnson to try to sway the president by forwarding notes from Varina Davis that she had written to Blair detailing her tribulations. "I trouble you," Blair wrote to Johnson, "because you ought to know the condition of the unhappy, innocent ones who are at your mercy." In the space of a single page, Blair managed to include the familiar refrains of Varina Davis - those of maltreatment and bitter feelings towards the captors of her husband and her desire to be able to leave Savannah, Georgia which undoubtedly did not impress Johnson. However, he also conveyed that "in her letter she asked that her husband may have a 'fair trial before a jury,'"[7] laying bare the fear of everyone in his camp that he would be tried before a military tribunal. With the recently ended military trial of the Lincoln

[7] Francis P. Blair to Andrew Johnson, July 18, 1865, *Andrew Johnson Papers*, Library of Congress.

conspirators and the soon to begin trial of Henry Wirz, the possibility loomed large that Davis would face the same fate. Joseph Holt was still investigating whether Davis was implicated in the murder and seeking to determine if "yet, more conclusive testimony bearing upon the complicity of the rebel leaders named in the murder of the President existed."[8] There is no evidence that Varina Davis was coached by Charles O'Conor to try to influence Johnson on the question of whether Davis would face a civil or military court, but the disadvantage of appearing before a military tribunal was clear enough for her to have seen on her own.

The lead counsel for Davis was directing other efforts to influence what he could not directly control. Through his associate, George Shea, O'Conor worked to dispel the idea that Davis had been involved in the atrocities at Andersonville. Shea wrote to Horace Greeley at the New York Tribune that:

> "I received from Mr. O'Conor, and want you to read, a letter, which ... ought to be published. It is an exoneration of Davis from any participation by act or word in the abuse of our prisoners and a most interesting and valuable historical testimony coming from the highest and best informed source. I am glad to possess this, as it relieves Davis' case from that odious feature. And I notice with pleasure that the charges and specifications preferred against Wirz (printed in this morning Tribune) does not state the name of Davis as among the persons with whom Wirz is therein said to have conspired. After I see you, it may be deemed advisable to publish the letter and have an editorial on the subject."[9]

Shea thought that it was imperative that Davis not be perceived as responsible for the horrors of Andersonville, remarking to Greeley that, "if the contrary cannot be made to

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[8] Joseph Holt to Edwin Stanton, July 3, 1866, *Joseph Holt Papers,* Manuscript Division, Library of Congress, Washington, D.C.

[9] George Shea to Horace Greeley, August 22, 1865, *Horace Greeley Papers*, New York Public Library, New York City.

appear, the case [defending Davis] is hopeless."[10] It becomes abundantly clear that the Davis defense team worked tirelessly to influence both political leaders and the general public. On August 25, 1865, Greeley published the following editorial in the *New York Tribune*:

> We can probably say nothing affecting the management of Military Trials that will not be attributed to spite against the present Secretary of War; and yet we cannot suppress our feeling that the false start in the Wirz trial was a bungle, and not a fair business transaction. There either was or was not evidence attainable which justified the indictment of James A. Seddon, (late Confederate Secretary of War,) Gen. Robert E. Lee and L. D. Northrop, as conspirators to murder our soldiers when in prison at Andersonville. If there was such evidence, the trial should have proceeded as it began; if there was not, it was unfair and unjust to arraign these persons, and send the blasting indictment all over the world. We don't believe in striking foul blows, especially at those who are down.[11]

The efforts to influence having borne little fruit, caused Varina Davis to write directly to President Johnson by August 1865. Still not permitted to leave her home near Augusta, Georgia, she wrote that

> I see by a recent paper, my husband has been permitted to correspond with Mr. Gillet, who is said to be one of the counsel employed for his defense. I am led to hope that I will now be permitted at last to send open letters through the proper channels. My anxiety about his health is intense and I am separated from all my children because I had a faint hope that in diminishing my family so much you might perhaps consent to let me go to Mr. Davis. I would bear any privations, imprisonment, or restrictions, take and keep any parole, to be with him, even if only for an hour each day. His health is always frail, and I have been used to ministering to him at such times as he has been suffering, and consider it the chief privilege

[10] George P. Lathrop, "The Bailing of Jefferson Davis," *The Century Magazine*, February 1887, 636-644, 636.
[11] *The New York Tribune*, August 25, 1865.

> of my life. Before you refuse me, pray remember how very long I have been separated from him.[12]

Enclosed in the letter to Johnson, Mrs. Davis placed a letter to her husband which she hoped would be forwarded to him.[13]

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[12] Varina Davis to Andrew Johnson, August 30, 1865, *Andrew Johnson Papers*, Library of Congress.

[13] Ibid. The letter is published in Jefferson Davis, *The Papers of Jefferson Davis,* 13 vols. to date, ed. Lynda Lasswell Crist, (Baton Rouge: Louisiana State University Press, 2008), 12:22-24, however editorial notes indicate that Jefferson Davis never acknowledged receiving the letter.

Illustration # 10: Jefferson and Varina Davis

Varina Davis chafed at being subjected to restrictions on her travel and confined to Georgia. The bitterness and haughtiness that her letters displayed hampered her efforts to have the restrictions removed. Visitors who met with President Johnson in October 1865 asked whether these restrictions might be lifted so that Mrs. Jefferson Davis might travel into South Carolina to see her friends. Johnson told his visitor that he "had

received letters from Mrs. Davis, but they were not very commendable. The tone of one of them, however, was considerably improved, but the others were not of the character becoming one asking leniency."[14] Johnson went on to discuss his general beliefs about Southern attitudes. He reportedly stated that "the character of an individual may characterize a nation which is nothing but an aggregate of individuals, and when a proper spirit is manifested, all can act harmoniously. The man who goes to the stake is almost dignified by his bearing. It lifts him above humiliation. In these cases, gentlemen, we will do the best we can. While there was sympathy there was a public judgment which must be met. I assure you, gentlemen, no disposition exists for persecution or a thirst for blood."[15] The President was unmoved by haughty letters from Varina Davis while Northern public opinion demanded some sign of repentance by the former Confederate elite. In the eyes of many Northerners, it was Southern hubris that began the war. Without a proper submission to the federal government, these elites should not expect to be helped by the President.

Blair also tried to help the Davis defense team gain access to their client. As stated earlier, two months into his imprisonment, Davis had still not met with his lawyers. Regular visits with a client charged with a capital offense are crucial to building the relationship necessary to provide quality legal representation. Not only do the visits garner factual information that might prove critical to the defense of a client, but the meetings also establish a level of trust that the lawyer has the client's best interests in

[14] *Richmond Whig*, October 17, 1865.
[15] Ibid.

mind and is working diligently on the case. Davis had no such assurances in the first months of his plight, despite the efforts of many to gain him face to face visits with his attorneys. He was relegated to having letters sent through the War Department to and from his counsel, assuring that no confidential information, so necessary in preparing a criminal defense, could be transmitted.

If Davis could not directly assist in his defense, his former associates continued to display a marked sense of loyalty to him, and often tried to help in his case. John H. Reagan, the former Confederate Postmaster General, was released from Fort Warren in Massachusetts and immediately traveled to New York City. In his *Memoirs*, he stated that "while in New York I called to see Charles O'Connor, the great lawyer, who had been engaged to defend President Davis, in order to confer with him about that defense."[16] As a former cabinet member, Reagan could have offered his knowledge of what was known and discussed by Davis about Andersonville and the treatment of prisoners during cabinet meetings. He also would have been able to assure O'Conor that, to Reagan's knowledge, the former rebel president was not involved in the conspiracy to assassinate Lincoln. O'Conor must have been very pleased to meet with Reagan.

The Davis defense team was working hard to address a number of issues in the case, but the time slipped by despite their efforts. Shea had already met with Chief Justice Salmon P. Chase about the case. Chase had earlier declined to discuss the Davis trial with President Johnson because of the impropriety of such a discussion. He did not

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[16] John H. Reagan, *Memoirs: With Special References to Secession and the Civil War,* (New York: The Neale Publishing Co., 1906), 228.

have the same hesitancy in discussing the case with Davis's lawyers. He told Shea that he considered "the late armed strife between the States as an open and public war, and that no charge of treason attaches to anyone engaged in it on the part of the Southern States."[17] This dovetailed completely with Daniel Webster's 1825 view of treason and did not escape Shea's notice that Chase was telegraphing him a potential defense to the treason charge. Chase then began a remarkable conversation about his own political ambitions that would be borne out only three years later. Shea remembered the Chief Justice saying:

> I have always been somewhat Democratic in my opinions; and now that slavery is at end, there is no reason why I should not be more so. You may yet see some old abolitionist candidate of that party for Presidency.[18]

Doubtless, Chase intended to curry favor with Davis's attorneys, who were, by and large, Democratic Party stalwarts. Ever ambitious, his political aspirations would color his handling of the Davis case throughout the proceedings, for better or worse.[19]

President Johnson addressed the plight of Southerners who engaged in rebellion and their claim to have simply followed the dictates of their State in his message to the

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[17] Lathrop, "The Bailing of Jefferson Davis," 638.

[18] Ibid. 639. See also Samuel S. Cox, *Union, Disunion, Reunion: Three Decades of Federal Legislation 1855 to 1885,* (Providence: J. A. & R. A. Reid, Publishers, 1885), 368-370 for a discussion of this view of treason.

[19] Chase's political aspirations were so apparent that even his biographical entry in *The Oxford Companion to the Supreme Court of the United States* remarks that he was "ever ambitious, Chase sought unsuccessfully to become a presidential nominee [in 1868]. (See EXTRAJUDICIAL ACTIVITIES)." Kermit L. Hall, ed., *The Oxford Companion to the Supreme Court of the United States,* (New York: Oxford University Press, 1992), 136-137, 137.

House and Senate dated December 4, 1865. "The States," he said, "cannot commit treason, nor screen the individual citizens who may have committed treason, any more than they can make valid treaties or engage in the lawful commerce with any foreign power." He announced that the Virginia circuit court, which would have had jurisdiction over the Davis treason trial, would not meet during the autumn or winter term for that trial. Johnson called on the Congress to provide for an early resumption of the civil judiciary in Virginia, citing the need to expedite the treason trials. His words conveyed his steadfast belief that "it is manifest that treason, most flagrant in its character, has been committed. Persons who are charged with its commission should have fair and impartial trials in the highest civil tribunals of the country, in order that the Constitution and the laws may be fully vindicated; the truth clearly established and affirmed that treason is a crime and that traitors should be punished and the offense made infamous." However, he added a final element to his refrain that might have troubled his listeners. He called on these trials as vehicles "that the question may be judicially settled, finally and forever, that no State of its own will has the right to renounce its place in the Union."[20] Had not the issue of the legality of secession been determined on the field of battle?

Johnson voiced a variation of that position weeks before his congressional address. On October 13, 1865, several South Carolinians met with Johnson to present him with a petition from their State Convention seeking the pardon or parole of Davis and several other prominent men. After the initial introductions, the President asked the

[20] "Message of the President," December 4, 1865, *Appendix to the Congressional Globe, 39th Congress, 1st Session,* 2.

petitioners to sit and engaged them in a conversation that revealed some of his thoughts about the power to pardon and treason. Johnson reportedly told the Southerners that pardons must be deliberately considered. Too often, he heard the rationale that one person should be pardoned because another who was just as bad had already been pardoned. Justice must be done but the government must also show "a proper degree of humanity," he reportedly said. But, he said, "if treason has been committed there ought to be some test to determine the power of the Government to punish the crime." He did not stop at that sentiment. A trial of persons charged with treason served more than simply as a vehicle to potentially punish the offender. In Johnson's view, "Looking at the Government as we do, and the laws violated in an attempt at the overthrow of the nation, there should be a vindication of the Government and the Constitution, even if the pardoning power were exercised thereafter. If treason has been committed, it ought to be determined by the highest tribunal and the fact declared, even if clemency should come afterwards. There was no malice or prejudice in which to carry out that duty."[21]

While Johnson persisted throughout the autumn of 1865 in his desire to punish Southern leaders for treasonous acts, the rift between the president and many of the Radical Republicans began to grow deeper. In September 1865, Thaddeus Stevens advocated in a speech that "we especially insist that the property of the chief rebels should be seized and appropriated to the payment of the National Debt, caused by the

[21] *Richmond Whig*, October 17, 1865.

unjust and wicked war which they instigated."[22] Andrew Johnson simply did not go far enough in the eyes of the Radical Republicans in seeking to punish the rebel leaders for the war.

The Question of a Speedy Trial for Davis

A little over seven months after Davis was captured in Georgia, the Senate passed a resolution calling on President Johnson to explain the charges that Davis faced and why he had not been brought to trial. The United States Congress had gone into session in December 1865. On December 13, 1865, the two houses appointed a joint committee to examine the condition of the states that had previously formed the Confederacy. The members of the legislative branch clearly asserted a right to lead the reconstructive process over the seceded states. The Senate resolution inquiring as to the reasons why Davis had not yet been brought to trial was consistent with the view that Congress had oversight responsibilities on the broadest range of post-war concerns. Indeed, the Report of the Joint Committee on Reconstruction found that Johnson "as President of the United States, had no power, except to execute the laws of the land as Chief Magistrate. These laws gave him no authority over the subject of reorganization."[23] The fissures in late 1865 would eventually lead to a break between the legislative and executive branches of

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[22] Thaddeus Stevens "Reconstruction," September 6, 1865, *Selected Papers of Thaddeus Stevens,* 2:13.

[23] *Report of the Joint Committee on Reconstruction,* (Washington: Government Printing Office, 1866), viii.

government in 1868. The legislative assertion of oversight responsibilities in the Davis treason prosecution was only one minor point of contention early in the road to Andrew Johnson's impeachment trial.

It fell to Edwin Stanton and James Speed to provide the answer to the Senate's inquiry. Rather than integrating the information into a single response, Johnson forwarded the individual responses of both Stanton and Speed to the Senate. The letters were eventually released to newspapers for publication. It was worthy enough, in the opinion of many editors, to publish in full. Stanton's letter subtly revealed a frustration with the lack of prosecution. He stated that Davis "has not been arraigned upon any indictment or formal charge of crime, but has been indicted for the crime of high treason by the grand jury of the District of Columbia." Davis was "also charged with the crime of inciting the assassination of Abraham Lincoln, and with the murder of Union prisoners of war, by starvation and other barbarous and cruel treatment toward them." Stanton went on to say that Johnson "was advised by a law officer of the government that the most proper place for such trial was in the State of Virginia." The Secretary of War does not reveal the identity of the "law officer" who told the President that Virginia was the "most proper place" for Davis' trial, nor does he attempt to explain why, if Virginia was the "most proper place," the trial could not be held in another jurisdiction. Revealing that Davis was apparently under indictment in the wrong jurisdiction, Stanton then wrote of an even more serious problem with the potential prosecution of the rebel leader. Virginia was within the judicial circuit assigned to Chief Justice Salmon Chase, "who declines, for

an indefinite period, to hold any court there."[24] After seven months in custody, Davis was not close to being tried. Stanton clearly was frustrated with the lack of movement in the case.

Speed's response was not a model for legal reasoning, instead offering only legal conclusions that he did not even attempt to explain. He wrote the President as follows:

> The Senate respectfully requests to be informed upon what charges and for what reasons Jefferson Davis is still held in confinement, and why he has not been put upon his trial.
>
> When the war was at its crisis Jefferson Davis, the commander-in-chief of the army of the insurgents, was taken prisoner, with other prominent rebels, by the military forces of the United States. It was the duty of the military so to take them. They have been heretofore and are yet held as prisoners of war. Though active hostilities have ceased a state of war still exists over the territory in rebellion. Until peace shall come in fact and in law they can rightfully be held as a prisoner of war.
>
> I have ever thought that trials for high treason cannot be had before a military tribunal. The civil courts have alone jurisdiction of that crime. The question then arises: Where and when must the trials thereof be held?
>
> In that clause of the Constitution mentioned in the resolution of the Senate it is plainly written that they must be held in the State and district 'wherein the crime shall have been committed.' I know that many persons (of learning and ability) entertain the opinion that the commander-in-chief of the rebel armies should be regarded as constitutionally present with all insurgents who prosecuted hostilities and made raids upon the northern and southern borders of the loyal States.
>
> This doctrine of constructive presence, carried out to its logical consequences, would make all who had been connected with the rebel armies liable to trial in any State and district into which any portion of those armies had made the slightest incursion. Not being persuaded of the correctness of that opinion, but regarding the doctrine mentioned as of doubtful constitutionality, I have thought it not proper to advise you to cause criminal proceedings to be instituted against Jefferson Davis, or any other insurgent, in States or districts in which they were not actually present during the prosecution of hostilities.
>
> Some prominent rebels were personally present at the invasions of Maryland and Pennsylvania; but all or nearly all of them received military

[24] *Hartford Daily Courant*, January 11, 1866.

> paroles upon the surrender of the rebel armies. Whilst I think that those paroles are not ultimate protection for prosecutions for high treason, I have thought that it would be a violation of the paroles to prosecute those persons for crimes before political power of the Government has proclaimed that the rebellion has been suppressed.
>
> It follows from what I have said that am of the opinion that Jefferson Davis and others of the insurgents ought to be tried in some one of the States or districts in which they in person respectively committed the crimes with which they may be charged. Though active hostilities and flagrant war have not for some time existed between the United States and the insurgents, peaceful relations between the Government and the people in the States and districts in rebellion have not yet been fully restored. None of the justices of the Supreme Court have held circuit courts in those States and districts since actual hostilities ceased.
>
> When the courts are open and the laws can be peacefully administered and enforced in the those States whose people rebelled against the Government – when thus peace shall have come, in fact and in law, the persons now held in military custody as prisoners of war, and who may not have been tried and convicted for offenses against the laws of war, should be transferred into the custody of the civil authorities of the proper districts to be tried for such high crimes and misdemeanors as may be alleged against them.
>
> I think that it is the plain duty of the President to cause criminal prosecutions to be instituted before the proper tribunals and at the proper times against some of those who were mainly instrumental inaugurating and most conspicuous in conducting the late hostilities.
>
> I should regard it as a direful calamity if many whom the sword has spared the law should spare also; but I would deem it a more direful calamity still if the Executive, in performing his constitutional duty of bringing those persons before the bar of justice to answer for their crimes, should violate the plain meaning of the Constitution, or infringe in the least particular the living spirit of that instrument.[25]

The letter indicated that several hurdles must be overcome before Davis could be tried. These obstacles to the trial rested entirely upon conclusions that the Attorney General made without offering facts to prove them nor without offering an explanation or time-table for resolving them. Speed muddies the legal waters that Lincoln and his cabinet had

[25] James Speed to Andrew Johnson, January 4, 1866, Johnson, *Papers of Andrew Johnson*, 9:570.

taken great pains to avoid. For instance, Speed wrote of a continued "state of war" and of Davis being a "prisoner of war." Speed appears to have taken no pains to avoid controversy by writing a clear, well-reasoned letter addressing the narrow question of why Davis had not been tried.

Speed's letter did not quiet the fears that Davis would not be tried or clearly state the steps that needed to be taken before the case could be tried. He used terms of great significance in the civil war - for instance "prisoner of war" and "war" - very loosely. He concluded that "though active hostilities have ceased, a state of war still exists over the territory lately in rebellion." Speed made this assertion despite Virginia holding state-wide elections in early June 1865. These elections were not for the Confederate Congress but were held in an effort to set the stage for elections to the federal Congress.
The newspaper accounts related "quiet and orderly conduct at the voting places."[26] Southerners were called to the polls in Virginia from the middle of July through early August 1865.[27] Elections could not have been held if a state of war existed.

Speed hurriedly assured President Johnson that Davis could be held "as a prisoner of war" until peace was achieved "in fact, and in law,"[28] again without hinting at what steps needed to be taken in order for peace to be attained. If these hurdles needed to be first overcome before Davis could be tried, the attorney general missed an opportunity to enumerate the steps that needed to be taken. Next, Speed indicated that high treason could not be tried by a military tribunal; instead, Davis would have to be tried in a civil

[26] *The Philadelphia Inquirer*, June 10, 1865.
[27] *The Baltimore Sun,* June 29, 1865.
[28] *Hartford Daily Courant*, January 11, 1866.

court in the "State or district wherein the crime was committed." It was the position of the Attorney General that Davis could not be tried for treason before a military tribunal, but Davis could have faced an indictment for the murder of Union troops. In his letter to the President, Speed ignored the findings of the military tribunal in the Wirz case. Lawyers for Wirz had objected to being tried before the military commission to no avail. They had also asserted that Wirz was protected by the parole that was part of Joseph Johnston's surrender terms to William Sherman. All of these arguments were litigated and ruled upon. If Wirz could be tried before a military tribunal in the nation's capital for events that occurred in Andersonville, Georgia, then certainly Davis, under indictment for the inhumane treatment of prisoners of war, could be tried in the same venue for the murder of Union prisoners of war. Even if Davis was not to be tried for Andersonville, could a favorable venue for a treason trial of Davis not be found in Pennsylvania or Maryland where sent invading armies had been sent by his orders?

Speed acknowledged that some well-regarded and scholarly individuals believed that Davis, as commander-in-chief of the Confederate Armies, could be found to be constructively present in any district invaded by the Confederate Army. If this doctrine was correct, it would have permitted his trial in Maryland, Pennsylvania and many other locations in the North. Speed did not cite any precedence for his position that this was of "doubtful constitutionality," but simply left this assertion alone. The potential venue of the treason case against Davis was not an academic question. If the law required the case to be tried in Virginia because Davis directed the government from that state during the

war, a conviction would be much more difficult to secure. The question became whether that was even possible given the views of most Southerners after the war.

Judge Underwood testified in Washington, D. C. before the Joint Committee on Reconstruction on January 31, 1866. The members of the committee harbored great concerns over a trial of Davis in the South. Underwood spoke of a "great bitterness of feeling between those who are loyal and those who adhered to the confederacy; and I think that bitterness has increased within the last two months."[29] Senator Jacob M. Howard of Michigan asked Judge Underwood whether it was possible to get a jury of loyal men. Underwood answered, "not unless it is what is called a packed jury." The judge then made a curious assertion: that African-Americans found more protection under the law than did loyal white men. He explained this by stating that the military shielded African-Americans from lawlessness, while since the return of Virginia to civil authorities, several loyal white men had suffered death and other injustices without any protection from the State of Virginia. It would be difficult for loyal white men to garner the courage to render guilty verdicts in treason cases if they feared for their safety, he implied. Underwood was equally skeptical of finding any Virginia jury that would convict a man of treason. When asked whether a Virginia jury could be found that might convict a man of treason, he answered that:

> It would be perfectly idle to think of such a thing. They boast of their treason, and ten or eleven out of the twelve on any jury, I think, would say that Lee was almost equal to Washington, and was the noblest

[29] Testimony of Judge John C. Underwood, *Report of the Joint Committee on Reconstruction, Part II,* (Washington: Government Printing Office, 1866), 6.

> man in the State, and they regard every man who has committed treason with more favor than any man in the State who has remained loyal to the government.[30]

The attitude of Southerners that the judge described to the committee reinforced the fear of many of these leaders that the people of the South were merely catching their breath before again attempting to break away from the Union.

Underwood did not see a possibility of a re-opening of the rebellion. But his years of residence in Virginia gave him an insight that would prove deadly accurate. The long war that had decimated the Southern population and devastated the Southern economy was not to be repeated. He did not believe that Southern leaders would again try to secede. His belief was not based on a perception on his part that State leaders had undergone a change of heart; they simply did not have the ability to rebel again. Instead, he perceived the intentions of the leading men of Virginia to regain control of the State through the ballot box. What they had lost as a result of the war, they would take back through the political process. Could these men be relied upon to judge their former leader in a treason trial?

Most importantly from the standpoint of a prosecution of Davis for treason, Underwood testified that Davis "is not as popular a man as General Lee by any means. He is regarded as their representative man, but I know that he is not really as highly esteemed as some others at the south. There are those who are strongly opposed to him at Richmond; some of the newspapers there were very hostile, particularly the Richmond Examiner." Underwood explained his perception of why Davis was not well regarded in

[30] Ibid. 7.

the South. Davis was thought of as lacking firmness, being selfish and displaying leniency towards prisoners during the war. But, when asked "could either [Lee or Davis] be convicted of treason in Virginia?" he responded, "Oh, no; unless you had a packed jury."[31] Packing a jury was unpalatable to men like Thaddeus Stevens, who called that prospect nothing less than "judicial murder."[32]

The Joint Committee on Reconstruction heard from Robert E. Lee on February 17, 1866 on a wide-ranging variety of subjects, from war debt to the freedman. On many of the subjects, he did not have a strong opinion. He professed to have little contact with politicians or to have a feel for the pulse of Virginians so as to be able to give the Committee an idea of how secessionists in his state felt towards the federal government. Lee dodged many of the questions by claiming, as may have been true, to simply not know the general sentiment of the people he had led in battle. He stated that his retirement was so complete that "I scarcely ever read a paper." Interestingly, he could not recall whether he took an oath of allegiance to the Confederacy. If one had been required, he testified, he would have taken it; however, he could not remember whether an oath was required.[33] Lee did offer opinions that Virginia would be better off if "she could get rid of" African-Americans and that the future of the state was impaired by the presence of the black population.

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[31] Ibid. 10.

[32] Thaddeus Steven, "Reconstruction," September 6, 1865, *Selected Papers of Thaddeus Stevens,* 2:15.

[33] Ibid. Testimony of Robert E. Lee, *Report of the Joint Committee on Reconstruction, Part II,* 129-136.

Senator Howard returned to the subject of treason trials with a series of questions for Lee.

> Question. Do you think that it would be practicable to convict a man in Virginia of treason for having taken part in this rebellion against the government, by a Virginia jury, without packing it with direct reference to a verdict of guilty?
>
> Answer. On that point I have no knowledge, and I do not know what they would consider treason against the United States. If you mean past acts -
>
> Mr. Howard. Yes, sir.
>
> Witness. I have no knowledge as to what their views on that subject in the past are.
>
> Question. You understand my question: Suppose a jury was impanelled in your own neighborhood, taken up by lot; would it be practicable to convict, for instance, Jefferson Davis for having levied war upon the United States, and thus having committed the crime of treason?
>
> Answer. I think it is very probable that they would not consider he had committed treason.
>
> Question. Suppose the jury should be clearly and plainly instructed by the court that such an act of war upon the United States, on the part of Mr. Davis, or any other leading man, constituted in itself the crime of treason under the Constitution of the United States; would the jury be likely to heed that instruction, and if the facts were plainly in proof before them, convict the offender?
>
> Answer. I do not know, sir, what they would do on that question.
>
> Question. They do not generally suppose that it was treason against the United States, do they?
>
> Answer. I do not think that they so consider it.
>
> Question. In what light would they view it? What would be their excuse or justification? How would they escape in their own mind? I refer to the past.

> Answer. I am referring to the past and as to the feelings they would have. So far as I know, they look upon the action of the State, in withdrawing itself from the government of the United States, as carrying the individuals of the State along with it; that the State was responsible for the act, not the individual.
>
> Question. And that the ordinance of secession, so-called, or those acts of the State which recognized a condition of war between the State and the general government, stood as their justification for their bearing arms against the government of the United States?
>
> Answer. Yes, sir. I think they considered the act of the State as legitimate; that they were merely using the reserved right which they had a right to do.
>
> Question. State, if you please, (and if you are disinclined to answer the question you need not do so,) what your own personal views on that question were?
>
> Answer. That was my view; that the act of Virginia, in withdrawing herself from the United States, carried me along as a citizen of Virginia, and that her laws and her acts were binding on me.
>
> Question. And that you felt to be your justification in taking the course you did?
>
> Answer. Yes, sir.[34]

Given the angst that Lee underwent in making the decision to resign from the United States Army, his testimony after the Civil War to the Joint Committee on Reconstruction reflects a remarkably passive view of fidelity owed to the government by a United States military officer.

What is astonishing is that the members of the Committee felt comfortable asking Lee, who had been indicted for treason, about the prospects of securing a conviction against a defendant like him, since he would surely fit the definition of "leading man,"

[34] Ibid. 133.

and Jefferson Davis. Lee's demeanor during the questioning must have been very open. The questioning led to the issue of cruelty towards Union prisoners. Asked, once again with the caveat that he did not have to answer, whether while in command at Richmond he was privy to knowledge of the cruelties practiced towards Union prisoners, Lee categorically denied any knowledge. However, Lee went further than simply denying whether he knew it occurred. Despite widespread proof of the systematic mistreatment of Union prisoners of war, Lee stated that "I never knew that any cruelty was practiced, and I have no reason to believe that it was practiced. I can believe, and I had reason to believe, that privations may have been experienced among the prisoners, because I know that provisions and shelter could not be provided them."[35] He pointed out to the Committee that prisoners of war were entirely the province of the Confederate War Department. Under follow-up questions, Lee admitted to having heard what he described as "mere hearsay" that mistreatment had been reported to the War Department during the rebellion, and to having learned after the war that Henry Wirz had been arrested for the crimes at Andersonville. By virtue of Lee's testimony before the Joint Committee on Reconstruction, the Attorney General and his staff now possessed the defense of Lee, and perhaps Davis, to the charge of treason and maltreatment of Union prisoners.

[35] Ibid. 134-135.

The Davis Prosecution Proceeds

At some time likely during the spring of 1866, William M. Evarts, Governor Clifford of Massachusetts, who had also been retained by the government as an attorney for the prosecution, and James Speed met to discuss the Davis prosecution. The discussion was of a practical nature, and the men exchanged views on venue with an eye towards determining a location "which would result in a proper verdict."[36] The men believed that they had a political duty to try the case in a suitable location that fit easily within any constitutional mandate. It was resolved to try him in Richmond, Virginia. They subsequently met with President Johnson in Washington, D.C. to discuss the Davis case.[37] The defense had other issues to try to resolve in addition to trial preparation. With a client who had been sitting in a prison for a year and an outspoken wife urging his release, O'Conor assigned an associate in his office to work on Davis's release. He picked George Shea, a forty year old lawyer, to manage that part of the case. Shea, like O'Conor, had Irish roots, having been born in Cork, Ireland before being brought to America as an infant. He was a formidable attorney in his own right who would serve as chief justice of the marine court of New York. A devout Christian, Shea would later write a book about Alexander Hamilton and a short manuscript entitled "The Nature and Form of the American Government Founded on the Christian Religion."[38] In the spring of 1866, O'Conor may have believed that Shea was uniquely qualified to try to gain the release of Davis because of Shea's old, intimate friendship with Horace Greeley, editor of the *New York Tribune* and a highly influential Republican voice. The defense hoped that

[36] Testimony of William M. Evarts, *Impeachment Investigation,* 645, 656.
[37] Ibid. 645.
[38] Davis, *Constitutionalist,* 7:488.

the alliance with Greeley in urging the release of Davis on bail might prove effective. Greeley's support for Chief Justice Chase during the 1864 presidential nominating process could not have hurt his association with the Davis defense team, either.[39]

Soon, Shea secured a meeting with James Speed to talk about Davis. Shea asked Greeley to go with him to Washington, D.C. for the meeting. As Greeley recalled, the conversation was between Shea, who was an attorney for Davis, and Speed, with Greeley merely being present. Shea soon turned to the object of the talk. Would Speed oppose Davis being granted a bond pending trial? As it turned out, the Attorney General was so reluctant to express a view that Greeley claimed to have no idea what Speed might do if presented with an application for bail. Neither did Speed give the two men any idea of what official position the Johnson Administration might take with such a motion.[40]

It is not completely clear whether Greeley was prepared to post bail on behalf of Davis as he would later do in 1867, and he professed to have never spoken to Davis nor had any communication with him about bail, but he certainly espoused that result. Whether he had the immediate means and backing to secure Davis's release on bond, especially since the setting of the bond amount was within the discretion of the judge, Greeley's object was certainly known in Washington. Republican senators Benjamin Wade, Zachariah Chandler and John Creswell, of Maryland, were strongly opposed to bail being posted on Davis. The senators met with Greeley in an attempt to dissuade him from going forward with his plan. During an animated half-hour conversation, Greeley

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[39] Glyndon G. Van Deusen, *Horace Greeley: Nineteenth-Century Crusader* (Philadelphia: University of Pennsylvania Press, 1953) 303.
[40] Testimony of Horace Greeley, *Impeachment Investigation*, 779-780.

became convinced that the three senators feared that Davis's release through the publisher's assistance would injure the Republican Party. Everyone concerned recognized that the political stakes were high in the matter of the United States of America v. Jefferson Davis.[41]

A Grand Jury finally returned an indictment against Jefferson Davis on the charge of treason in May 1866.[42] The testimony which had secured the true bill was based on the testimony of several individuals who placed Davis at the helm of the Confederate government during the war. One witness, J. F. Milligan, told prosecutors that he was in Richmond during the war and "saw Jeff Davis when he was President in 1863 at the Custom House, when a War was in operation against the United States Government." His testimony was not much different than that which thousands of Southerners could have offered. He said that he received his commission from Judah Benjamin in Benjamin's capacity as Secretary of War and that he knew John Breckinridge as Secretary of War in 1865. He claimed to have heard Davis's inaugural address in 1862 "influencing the people to take up arms against the U. S. government."[43]

Judge G. P. Scarbourg offered evidence that he knew "Jeff Davis for many years as President of the Confederate States by common report."[44] The judge refused to answer many questions by invoking his privileges under the Fifth Amendment. Other witnesses

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[41] Ibid. 780.
[42] Appendix "B," Davis Indictment, Jefferson Davis Trial Papers, Library of Virginia, Richmond, Virginia.
[43] Notes on Witnesses, *Jefferson Davis Trial Papers*, University of Chicago, Chicago, Illinois, Box 1.
[44] Ibid.

offered evidence that John Breckinridge was in Confederate uniform during the rebellion and that Davis had conducted personal interviews on official business while holding himself out as president of the Confederacy. Although this evidence might permit the indictment of Davis and Breckinridge, it would not be very useful at a trial of the case. In practical terms, a prosecutor might need to distinguish Davis from the dozens of high ranking Confederate officials in order to get an impartial jury to convict him of treason. Juries are skeptical about the government singling out individuals for punishment. The high stakes of a death penalty case make the need to make a distinction between Davis and others who arguably committed treason even more important. Simply proving that he was the president of the Confederacy would not differentiate him from the hundreds of other officials and military officers who engaged in war against the United States government. Prosecutors must have worried that a jury would not be inclined to sentence Davis to death for simply being the face of the Confederacy.

According to Chandler, he was taken by surprise by the grand jury indicting Davis. As the United States Attorney, he should have been deeply involved in the grand jury investigation of Davis. Instead, he was taken by surprise when he was told by members of the Grand Jury that a true bill had been found against Davis. Chandler had expected to wait for the circuit court to organize a grand jury to seek an indictment against Davis but Judge Underwood believed that the district court grand jury should make the decision. As a result of this miscommunication, Chandler had not prepared an indictment beforehand. He found himself taken aback by the news that a true bill had been returned. Underwood caused further problems for the prosecutor when he told

Chandler that court would adjourn promptly at three in the afternoon so that the judge could travel to Norfolk. This gave Chandler only two or three hours to prepare the indictment. As a result, the "indictment was very hurriedly prepared by me,"[45] Chandler later admitted. It is impossible to explain how a federal prosecutor failed to realize that his most important criminal case was being reviewed by a grand jury. Yet, Chandler did not know.

The indictment that Chandler drafted was an identical copy of the language of those indictments returned earlier against other Confederate leaders,[46] so while he may have said that it was "very hurriedly prepared," in truth, it was very hurriedly copied. Incredibly, the charging instrument brought against the former president of the Confederacy was not, in any way, contoured to the acts that Davis had taken during the Civil War that arguably could constitute treason. Chandler had no help from the Attorney General or anyone associated with the Administration. The allegations were general and vague, and perhaps most importantly, unclear as to whether the charge of treason was being brought pursuant to the Treason Act of 1862 or the prior statute governing treason, passed on April 30, 1790. This was significant because of the potential punishment available under each statute. Under the Act of 1790, treason was punishable only by death. However, this changed with the Treason Act of 1862 which permitted imprisonment and other sanctions less than death.[47]

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[45] Testimony of Lucius H. Chandler, *Impeachment Investigation,* 503.

[46] This is true, except for the indictment of John C. Breckinridge, which had language unique to him.

[47] Testimony of Lucius H. Chandler, *Impeachment Investigation,* 503-504.

The grand jury indictment drafted by Chandler charged, in part, that Davis had incited "insurrection, rebellion, and war"[48] against the United States of America. The language was stilted and poorly drafted, but clearly charged that Davis had engaged in rebellion and insurrection, allegations that arguably were made under Section 2 of the Treason Act of 1862.[49] If he was found guilty of treason under that section, his punishment would be limited to a prison sentence of a minimum of ten years. The indictment also included language alleging that Davis "did ordain, prepare, levy, and carry on war against the said United States, contrary to the duty of the allegiance and fidelity of the said Jefferson Davis, against the Constitution, government, peace and dignity of the said United States of America, and against the form of the statute of the said United States of America in such case made and provided." Within this sentence, it could be argued that Davis had been charged with levying war against the United States, a crime under the Constitution and under the Act of April 30, 1790. Unfortunately, he did not reference either statute in the indictment. Chandler later stated that the indictment was framed so as to meet either the statute of 1862 or the original treason statute of April 30, 1790.[50] This explanation is a poor one, indeed. No lawyer would want to draft a legal document charging a crime that left uncertain whether the accused faced a prison sentence or death as the maximum punishment. To say that it met both statutes was to say that it left open the argument to the defendant that punishment was capped at

[48] Indictment of Jefferson Davis, May 10, 1866, Library of Virginia. See Appendix 2.
[49] *The Congressional Globe,* Appendix to the Congressional Globe, July 16, 1862, 412.
[50] Testimony of Lucius H. Chandler, *Impeachment Investigation,* 503.

imprisonment. If Chandler intended for Davis to face the death penalty, the indictment he drafted for the Grand Jury was woefully inadequate.

It cannot be known today why Lucius Chandler failed in his duties as a prosecutor in the treason trials. As stated above, it could be that he was simply intimidated by the magnitude and importance of the cases. It could also be that his legal skills were inadequate to the task. Whatever the reasons, it was clear even as the case was being prosecuted that he should not have been the lead prosecutor in the case. The problems that arose because of his shortcomings began to become evident immediately and nothing that he did as time progressed indicated that he would rise to the challenge.

Chief Justice Salmon Chase and the Jefferson Davis Trial

On May 24, 1866, the *New York Tribune* published a lengthy report on its front page from George E. Cooper, the military doctor charged with examining Jefferson Davis by President Johnson, detailing the health of the famous prisoner. The report was dated two weeks previous. Cooper found Davis to be "quite weak and debilitated." The primary problem that the doctor reported revolved around Davis's failing nervous system. For instance, it was stated that even "slight noises, which are scarcely perceptible to a man in robust health, cause him much pain," while Davis said that he was very sleep deprived, complaining that he rarely slept for more than two hours at a time. "Should he

be attacked by any of the severe forms of disease to which the tide water region of Virginia is subject, I, with reason, fear for the result."[51]

Davis' defense team quickly filed an Application for the Release of Jefferson Davis on bail. Horace Greeley immediately wrote to Chief Justice Chase to try to influence the judge in attaining either of two goals. First, actually holding the trial of the case. Failing that, he asked for the setting of a date certain for the trial. Informing Chase that both Charles O'Conor and George Shea would be appearing in Richmond on June 4, he implored the chief justice to personally appear to preside over the court. Greeley sought to influence without appearing to overtly doing so. He wrote Chase that "I am confident that an intimation from yourself to the Attorney General will secure the requisite action." The editor also wanted to try to neutralize the influence of Judge Underwood, who the defense feared would not be nearly sympathetic enough to Davis. "You know, dear Sir, that our friend Judge Underwood will be out of his depth on such an occasion and that it is indispensable that the bearing as well as the action of the Court shall be such as will command respect even where it fails to secure approval." Then, catching himself, he penned, "I will say no more, but profoundly trust that the proceedings to be had on this occasion will be guided to a fit issue by yourself."[52]

Salmon Chase replied in a lengthy letter to Greeley immediately upon receipt of the correspondence. He began by claiming to "know nothing of what is proposed either by the Govt. or by the Counsel for Mr. Davis in respect to his trial." He then explained to

[51] *New York Tribune*, May 24, 1866.

[52] Horace Greeley to Salmon P. Chase, June 1, 1866, *The Salmon P. Chase Papers*, Manuscript Division, Library of Congress, Washington, D.C.

Greeley why he would not be attending the session. "In the Districts, in rebel states, I have not held courts, because in such states, as it seems to me, all courts must be either military or quasi-military until complete restoration under legislative action, or, at least, until restoration of the Writ of Habeas Corpus and abrogation of Martial law by Executive action." He complained that there was no settled policy during the Civil War on when a civil court might resume complete control over the jurisdictional questions that would normally fall within the scope of its powers. Even when some courts attempted to reestablish jurisdictional authority, "instances are not wanting where their acts have been nullified by military orders; and even in the late Charge to the Grand Jury, at Norfolk, Judge Underwood referred to the President and General Grant as, in some sort, authority for his action."[53]

Chase admitted that he had consistently told civil district and circuit judges to yield to military authority, or refer the matter to the President, when the two found themselves in conflict. "In flagrant war and until restoration of peace, in districts or states where military control is essential to the accomplishment of the objects of the War, the civil must needs be subordinate to the Military authority." But he saw a distinction when the issue of subordination came to the United States Supreme Court, ignoring his earlier assertion about the need for all courts to be open. "The Chief Justice and Justices of the Supreme Court of the United States represent the HIGHEST JUDICIAL POWER of the Nation, which cannot, with propriety or decency, be subordinated to any military

[53] Ibid. Salmon P. Chase to Horace Greeley, June 1, 1866.

authority."[54] His position was that the highest judges of one of the three main branches of government should not defer to military authority. How then could the practical question involving the treason trial of Davis be solved?

This is where the Chief Justice's reasoning begins to convey a sense of avoidance. Of course, a State's complete restoration and federal legislative acceptance of the State would re-establish proper civil judicial authority. Short of that, however, Chase thought that a presidential proclamation ending martial law and restoring habeas corpus in all cases where federal courts had jurisdiction was necessary. He acknowledged that the Peace Proclamation, dated April 2, 1866, was said to have done just that. He wrote Greeley that "I express no opinion concerning the effect of that proclamation."[55] But because the military continued to operate in a fashion contrary to the construction of the Peace Proclamation, he was unwilling to construe it as having ended martial law and having restored habeas corpus. He enclosed to Greeley a draft proclamation that he had given to President Johnson weeks before which he believed would clearly permit him to preside over a court in Virginia. He told the editor that Johnson had apparently taken it under advisement. Nonetheless, Chase's correspondence revealed that "I desire to avoid all causes of irritation or controversy. There is enough and too much division right now."[56] A treason trial of Davis could not be held without "irritation or controversy." Four days later, evidently having read the *New York Tribune* article about Davis's health,

[54] Ibid.
[55] Ibid.
[56] Ibid.

Chase wrote Greeley that "The 'Anxious' man can have a trial before Judge Underwood."[57]

Chase's desire to avoid being associated with the trial is unmistakable. As the June trial date arrived, Chase would sit at his desk in the corner of his library in Washington, D.C. penning a letter to his daughter, Nettie, and recount to her the "newsboy cries 'Dai-l-y Chron-i-cle full account of' something I don't understand what and 'trial of Jeff Davis!' The sun is under a cloud; but we can dispense with his smiles."[58] Even on a gloomy day, Chase was happy to be away from Richmond.

The Trial Date Nears

Whether Chief Justice Chase decided to stay away from the courtroom in Richmond, the defense team had work to do. Davis' popularity had risen in the South during his yearlong incarceration. Newspapers reported that the people of Richmond believed that "Davis is no traitor unless all the late rebels are, and that no one should be tried and punished unless all are subjected to the same ordeal." Already, reports in the North were that "the difficulty of procuring a jury is manifest."[59] The *New York Tribune* offered a more succinct opinion on finding a jury: "A loyal jury cannot be collected here

[57] Ibid. Salmon P. Chase to Horace Greeley, June 5, 1866, *The Salmon P. Chase Papers, Correspondence, 1865 - 1873*, 5 vols. ed. John Niven, (Kent, Ohio: The Kent State University Press, 1998), 5:105.
[58] Ibid. Salmon P. Chase to Janet Chase, June 5, 1866, 5:103.
[59] *Commercial Advertiser*, June 5, 1866.

to try a case of treason without being threatened with martyrdom, social or otherwise."[60] The threat of violence against jurors could not be overlooked by John Underwood, who had been the target of threats and violence from white Southerners before the war. He had arrived from Alexandria, Virginia, in the early morning of June 5, 1866 and spent most of the morning at the headquarters of the military occupation force. Many of the grand jurors who had indicted Davis on treason were to arrive to present the indictment. The hearing would be held in the old Customs House on Main Street in Richmond, a location literally down the hill from the Virginia State Capitol. A courtroom had been beautifully refitted and would serve as the trial courtroom for all of the appearances in the case. Shortly before noon, several of the lawyers for the accused arrived. William B. Reed, James T. Brady and George William Brown milled around the courtroom chatting with local Richmond attorneys. Others on the Davis team, including Edwin Van Sickle and Thomas Edsall, associates in the law firm of Charles O'Conor's, and Charles N. Gross of Philadelphia, simply waited around the oblong defense table for the court to come to begin. Robert Ould was present for the Davis team but stood away from the main group of defense lawyers. Ould, as the former Agent of Exchange of prisoners of war for the Confederacy, was a controversial figure, previously indicted for treason himself. The defense team would likely want him to be present because of his knowledge of Richmond and its citizens, but would not want him to be front and center before Judge Underwood. Burton N. Harrison, late secretary of Confederate President Davis, circulated freely in the courtroom "chatting with nearly everybody" and making himself a

[60] *New York Tribune*, June 5, 1866.

conspicuous figure. There appears to have been a nervous energy in the courtroom as the lawyers waited for court to begin. Rumors circulated that Charles O'Conor was in Washington waiting to determine what action, if any, might be taken by President Johnson and was intending to telegraph the defense team to either urge a speedy trial or the release of their client.[61] O'Conor later admitted that "I had positive information that the government would not prosecute at that time and that consequently I did not attend myself."[62] From whom he acquired that positive information, he did not say. However, the government appeared to be a sieve that regularly spilled information to the defense during the course of the case.

Back in the Richmond courtroom, one reporter stated that only fifteen or twenty spectators, a number that included two women from New York, in the courtroom, attributing the lack of interest to the general belief that the case would be passed on the trial docket.[63] The judge took the bench at one o'clock. As the courtroom came to order, Underwood had the names of the grand jurors called. Fourteen responded as being

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[61] *Albany Evening Journal,* June 6, 1866, and *New York Herald,* June 6, 1866.

[62] Charles O'Conor to Burton Harrison, June 25, 1866, *Burton Harrison Papers,* Library of Congress, Washington, D.C.

[63] *Albany Evening Journal,* June 6, 1866, and *New York Herald,* June 6, 1866. The Customs House now serves as the building housing the federal United States Court of Appeals for the Fourth Circuit. It is closed to the public, and my efforts to get a tour of the building were rebuffed until I asked to go to the Office of Attorney Admissions, at which time I was given access to that office to apply for admission to the Court. Once inside the building, I spoke to the federal marshals about getting a tour of the building. They contacted Sarah Carr, one of the Communications Specialists, who was gracious enough to give me a tour of the entire Customs House. Unfortunately, the courtroom itself is no longer there, but Ms. Carr did show me where it once existed.

present but this was not a quorum. As court personnel were sent out to find the stragglers, Judge Underwood began to read a newspaper from the bench. He then turned his attention to a law book before beginning to write. The courtroom was in recess, despite the presence of the judge, and the lawyers continued chatting during the break. Finally, the judge called two other men to the clerk's desk to be sworn in as grand jurors. One potential grand juror refused to take the oath. After a delay of an hour to determine what should be done because of the man's refusal, he was excused for not being able to subscribe to the test oath required for service. When another juror entered the courtroom, after a delay of two hours and forty-five minutes, Underwood undertook to begin work. The judge then spoke to them, at length, about the intimidation to which they may find themselves subjected, before appointing a foreman because the previously named foreman had not appeared in court and allowing them to retire to a conference room to work.[64] His words would become fodder for those who accused him of bias against Davis.

> We ought not to be surprised that the treasonable and licentious press of this State and city should wince and rage and become furious when treason and licentiousness are exposed and arraigned for trial and punishment; nor should we be surprised at the enormity and desperation exhibited when we remember that this city has long been the centre and seat of the greatest traffic in human beings that has ever disgraced the world. ... The complaints of threatened violence and intimidation which have been forwarded to me by several of your number for your late heroic and patriotic actions have been submitted to the highest legal and military authorities of the Government, and I can assure you of the earnest sympathy and firm support of all the officers of the law, not excepting the

[64] *Albany Evening Journal,* June 6, 1866.

> President, whom the treasonable now flatter and fawn upon, but whom they will probably soon curse as heartily as they did two years ago.[65]

Underwood informed the men, and everyone present in the audience, that a federal statute made it a serious crime to attempt to intimidate a federal juror. His remarks may have been warranted, although harsh, had he stopped at this point. Instead, he launched into tirade against the Richmond press:

> You will thus have it in your power to exercise a wholesome restraint upon licentious tongues and pens, and upon a press which, as a blind leader of the blind, has been and still is one of the chief causes of past, present, and prospective calumny and misfortune. The murders, duels, assassinations, violent and ungoverned passions, ending in self-conflagration and self-immolation unparalleled in any heathen country, the poverty, suffering, agony and degradation which have given this city, of almost unparalleled natural capabilities, its bad eminence, are the legitimate fruit of the teachings of the public press; and anything that you can be able to contribute toward reformation will in the highest degree be serviceable to the cause of the country and of humanity. But, gentlemen, let us act with moderation and discrimination, for, though a prostituted press is one of the greatest calamities, a free and virtuous press is one of the greatest public blessings - the greatest ornament and the support of public virtue.[66]

Northern newspapers reported "that the Grand Jurors who found the bill against Davis for treason are subject to much persecution in the South," and speculated that any jury who "dared convict him on the bill and in accordance with law and evidence" would find it "too hot for them down there."[67] Underwood's concern for the grand jurors was understandable, but the resentment of his past treatment in Richmond now spilled out into

[65] *Commercial Advertiser,* June 6, 1866.
[66] Ibid.
[67] *Jamestown Journal,* (New York), June 15, 1866.

the nation's press. It is hard to imagine any fair-minded person reading his remarks and believing that he was an impartial judge in the Davis case.

Even sympathetic Northern newspapers found his words to be of concern. The *Commercial Advertiser* of New York emphasized that "all loyal men desire to see Jefferson Davis suffer in some way for his offences," and editorialized that it was the leader of the Confederacy and not Richmond's editors who were being arraigned in federal court in Virginia. Underwood's utterances, they feared, would do nothing but bring sympathy to the rebel leader. However, most importantly, Underwood's words raised "a doubt whether a Judge who thus gives way to his private griefs, is a fit person to sit in judgment upon the dethroned leader."[68] Jurors who voted their conscience in returning the indictment against Davis undoubtedly faced the threat of violence and intimidation in Richmond, Virginia. The federal judge, in whose courtroom the case would be assigned, had faced the same type of physical and emotional abuse for his efforts against slavery prior to the war. Underwood certainly felt a strong need to reassure those who had acted within the federal criminal system that they should not be bullied. However, his words put his judicial temperment into question. Underwood's initial public appearance in the Davis case went very badly for the justice system. To those who believed that Underwood was not up to the task of trying such a high-profile case, his intemperate remarks reinforced that view. The inclusion of Chief Justice Salmon Chase as the trial judge now took on an even greater importance, with unforeseen consequences attendant to this necessity.

[68] *Commercial Advertiser,* June 6, 1866.

Significantly for the prosecution, Lucius Chandler, the United States District Attorney charged with the lead role in the Davis prosecution, was said to be in Norfolk, Virginia, confined to his room, too ill to travel to the state capital. With the grand jury now working in an adjoining room, Underwood had no more formal business before the court. Underwood almost informally engaged counsel for the defense, an opening that resulted in some confusion in the courtroom. "We shall be happy to hear from members of the bar," he said, "always giving preference to members from a distance." William B. Reed, Davis's co-counsel of Philadelphia, rose in response to the opening. He introduced himself as if Underwood did not know who he was. "I beg to present myself in conjunction with my colleagues as the counsel of Jefferson Davis, a prisoner of state at Fortress Monroe, and under indictment for high treason in your Honor's court."[69] Reed launched into the concerns of the defense team.

"We find in the records of your Honor's court an indictment charging Mr. Davis with this high offence, and it has seemed to us due to the cause of justice, do to this tribunal, due to the feelings of one sort or another which may be described as crystalizing around the unfortunate man, that we should come at the very earliest day to this tribunal, and ask of your Honor, or more properly, the gentleman who represents the United States the simple question: What is proposed to be done with this indictment?"[70] The actions of the defense would be dependent upon the answer to this question. "Is it to be tried, is it to be withdrawn, or is it to be suspended?" he asked. Reed then dramatically made an

[69] *New York Herald*, June 6, 1866.
[70] Ibid.

assertion to the court. "I say with emphasis, I say it with earnestness, that we come here prepared instantly to try that case, and we shall ask no delay at your Honor's hands further than is necessary to bring the prisoner to face the Court." Even without Charles O'Conor, the defense made a compelling argument that was full of confidence in their case. Reed continued in his questions about the indictment. "Is it to be withdrawn? If so, justice and humanity seem to us to prompt that we should know it." And, then, Reed made the argument that would be urged over and over again by the defense. "We ask a speedy trial on any charges that may be brought against Mr. Davis, here or in any other civil tribunal in the land."[71] Without Chandler, who was the lead prosecutor, Major John L. Hennessy, the Assistant United States District Attorney, was forced to admit that he was caught unaware by the defense demand for a speedy trial. He did not know whether the case would go forward or not. Hennessy explained that Lucius Chandler was expected in Richmond later in the day. Once here, obviously, Chandler would be able to tell the Court if the defense demand could be honored. If he did not arrive, then Hennessy told Judge Underwood that he would inform the Court about the plans to try Davis by the next morning. However, the prosecution argued, somewhat ironically given that the government sought the death penalty, that Davis was in delicate health, and a protracted trial in the Richmond heat would be a cruelty to him.[72]

[71] Ibid.

[72] *New York Tribune*, June 5, 1866, and June 6, 1866; Albany Evening Journal, Albany, June 7, 1866, and *New York Herald*, June 7, 1866, and June 6, 1866.

The next day, the Court drew to order just before 11 o'clock in the morning. The courtroom was full of spectators interested in hearing what the government prosecutors planned to do with Davis. Underwood soon addressed John Hennessy, the assistant prosecutor, and asked to hear from him. Hennessy's address to the Court revealed a strange nervousness on his part. If Grand Jurors faced a hostile public in Richmond for their part in the Davis prosecution, government attorneys must have found themselves very unpopular. Whether fear played a role in his demeanor cannot be determined, but he acted as if he wanted to be considered nothing more than a messenger to the Court. He told Judge Underwood that "as the questions propounded by Mr. Reed yesterday are considered of some importance, I have written them out, and propose to read them to the Court."[73] This was an inauspicious beginning.

All that William Reed had demanded the day before was a speedy trial for Davis. He put the prosecution on the spot by asking whether the government intended to try the case, but this hardly should have been taken as a serious question to the men chosen to prosecute the case. How, one asks, could this question have befuddled a federal prosecutor? A federal grand jury had just returned a treason indictment against Davis a month earlier. It alleged that the president of the Confederacy had violated the duty of his allegiance to the United States and waged a war against it that resulted in the deaths of hundreds of thousands of its citizens. Why would an indictment have been sought if the government did not intend to prosecute it? Certainly a seasoned prosecutor would have retorted, without hesitation, that since an indictment had been returned on a heinous,

[73] *Commercial Advertiser,* June 6, 1866.

capital offense, the case would be prosecuted to the full extent of the law. Instead, Hennessy was so far out of the loop that he did not believe himself to be competent to respond until the next day. And worse, now standing before the Court, he felt compelled to read the answers to the questions rather than respond forcefully to the strange query of whether the charge would be pursued. The defense team must have been pleased with the unprofessional response of the prosecutor. It got worse.

"Mr. Chandler is still absent, being, I regret to say, entirely prostrated by a recent severe domestic calamity, but as I promised that I would proceed to-day to reply to the questions of the learned gentleman, I shall do so." Hennessy then read the questions that Reed had propounded. In reply, he said, "So far as I am instructed, *I believe it is to be tried.*" The lawyer then listed several reasons why it could not be immediately tried. First, he stated, Davis was in military custody and not subject to the jurisdiction of the court. Second, Attorney General Speed was too busy to try the case at this session of the court. Finally, Davis's health precluded a trial in the summer heat. He tried to offer assurances to the defense team.

> Neither this Court nor any of its officers have any present control over the person of Mr. Davis, and until they have it becomes impossible for the District Attorney to say where he will be tried - but I assure the gentlemen who represent Mr. Davis here that the moment he comes into the custody of this Court they shall have full and prompt notice when it is intended to try him.
>
> So far as the District Attorney and his associates are concerned, they may feel assured that their case will have a just and speedy trial, without further barrier, let or hindrance.

> This I say for the special department of the Court which I represent. But what the intentions of the Government are with regard to the disposition of Mr. Davis, I am no further instructed than I have said.[74]

Hennessy then requested that the case be moved to the fall term of the Court.

James T. Brady, a lawyer for Davis, emphasized to Underwood that Davis had not been served with a copy of the indictment, nor with a list of witnesses, both prerequisites for a felony trial. But, he said, "Mr. Davis is not claiming the benefits of any of these wants of forms."[75] Despite these irregularities, Brady told the Court that the defense was anxious for a speedy trial. Responding to the prosecution's newfound concern for Davis's health Brady asserted that the heat at Fort Monroe was worse than that in Richmond. Underwood disagreed. "I think counsel are mistaken in supposing that Fortress Monroe is not as comfortable a place as Richmond. When I have been there in the summer I have found the sea breeze very refreshing," he said. To which, Brady responded, "but very limited society, your Honor," causing laughter to break out in the courtroom. "We, the counsel of Mr. Davis, can only say that we are entirely ready" for trial. "We know that we cannot control the action of the District Attorney. We thank him for his polite response." Judge Underwood listened to the arguments and then revealed in his remarks that he and Chase had already discussed and decided the trial schedule. Chief Justice Chase had named the first Tuesday in October as convenient for him to try the case. The Davis trial was then adjourned until that day.[76]

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[74] Ibid.

[75] Ibid.

[76] It is axiomatic in the defense of criminal cases that a criminal defense attorney is never so ready to try a case as when the prosecution is

The aggressive tone of the argument from defense counsel underscored the shifting moral high ground from the government to the defense. Never would the government claim that ground during a court proceeding. The defense demanded only that which every American citizen was entitled; namely, a fair and speedy trial. In return for being granted that, the defense claimed to be ready to waive notice of the indictment and all other procedural rights due their client. The prosecutor only had to assure the Court that they too were intent on bringing Davis to trial quickly, and would do so, if only granted one more continuance. Hennessy could have pointed to facts which would have placed the government and the defendant in a different light. He could have argued that Davis had betrayed the very government which he had served for decades. His treason had extended over four years of brutal warfare and resulted in the deaths of hundreds of thousands of Americans. Yes, he had been held in custody for a year. For a man who allowed Union soldiers to wither and die from exposure at Andersonville, his warm quarters, whether uncomfortable or not, should not prove too hard a burden to bear. And, the delay in trial was not so great an inconvenience that it warranted making a martyr of this traitor. How, one asks, could Hennessy have missed the opportunity to make these arguments? Instead, Hennessy allowed the defense to champion their client's interests without striking a blow in return. Somehow, the momentum for the prosecution needed to be regenerated. As it now stood, the defense appeared to be gaining control.

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obviously unable to do so. Davis' defense team demand for a speedy trial despite not having a copy of the indictment or a list of prosecution witnesses seems to fall squarely within this axiom. *Albany Evening Journal*, June 7, 1866; *Alexandria Gazette*, June 7, 1866; and, *Commercial Advertiser*, June 6, 1866.

Here he exclaimed with much sarcasm that Davis would never be punished, simply because Mr. Johnson had determined to have him tried in the one way that he could not be tried, and had determined not to have him tried in the only way he could be tried.[1] *– Report of an Address by Fredrick Douglass, March 1866*

Chapter 6

The Impenetrable Future

Swings in momentum are often not felt by lawyers and parties in a lawsuit. Too often, the day to day work obscures an attorney from this realization. The activity surrounding the Jefferson Davis trial was yielding some rather small, but important, results that needed to be accomplished before Davis could be tried. Attorney General James Speed met with O'Conor and followed up on their interview with a request to the President to permit Davis to have his attorneys visit him. President Johnson wrote Secretary of War Edwin Stanton asking for an order to be issued to General Miles at Fort Monroe allowing counsel to meet with Davis. Among the men authorized to see Davis was Burton N. Harrison, Davis's private secretary during the war, who had been accepted into the New York bar as an attorney following his release from prison.[2]

On Thursday, June 8, 1866, Davis was visited by some of his defense team - William B. Reed, Edwin A. Van Sickle and Thomas Henry Edsall - along with Burton N.

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[1] Frederick Douglass, "The Issues of the Day: An Address Delivered in Washington, D.C., on 10 March 1866," March 10, 1866, *The Frederick Douglass Papers*, 4 vols. (New Haven: Yale University Press, 1991), 4:122.

[2] Andrew Johnson to Edwin M. Stanton, June 6, 1866, Andrew Johnson, *The Papers of Andrew Johnson*, 16 vols., ed. Paul H. Bergeron, (Knoxville: The University of Tennessee Press, 1992), 10:567-568.

Harrison. Van Sickle and Edsall were young associates of Charles O'Conor, who did not make the trek to Fort Monroe. Instead, he remained in Washington, D.C. in hopes of having a meeting with President Johnson and Attorney General Speed. Davis had just acquired, on May 25, the privilege of access to the entire grounds of Fort Monroe during daylight hours. He was granted this concession after he signed a document that he would "make no attempt to, nor take any advantage of any opportunity that may be offered to effect my escape" by virtue of this liberty. Varina Davis, able now to visit her husband, prepared dinner for the men in Davis's casement, using goods for which local merchants refused payment, insisting that the honor of helping Davis was compensation enough. Amidst Davis' newfound popularity, the men worked on his defense. Reporters who waited for them outside the fort found the defense team confident that Davis would be released within a week.[3] Davis would be bitterly disappointed.

George Shea brought the Application for the Release of Jefferson Davis to Judge Underwood, while the judge was in Washington, D.C., for action. Pratt and O'Conor were also present, while Attorney General James Speed was there for the prosecution. The defense request was denied by Underwood on the grounds that Davis was in military custody and outside the reach of the civil courts. O'Conor asked that Underwood put his ruling in writing so that the issue could be presented to the President. The defense lawyer was convinced that Johnson would remove this impediment to Davis's release. Underwood had no qualms about giving the defense a written ruling. In a brief order

[3] *New York Herald*, June 9, 1866, and *New York Tribune*, June 9, 1866; Davis, *Papers of Jefferson Davis*, 12:152.

dated June 11, 1866 addressing the Application, Underwood lent credibility to the concerns raised earlier by Chief Justice Salmon Chase. Underwood recounted that Davis had been arrested under a proclamation signed by President Johnson charging Davis with complicity in the assassination of the late President Lincoln. Davis, Underwood noted, was then being held as a military prisoner in Virginia, a State still under military jurisdiction and martial law. Davis "is not and never has been in the custody of the marshal for the District of Virginia, and he is not therefore, within the power of the court. While this condition remains, no proposition for bail can be properly entertained, and I do not wish to indicate any probable action under the circumstances."[4] Underwood could have simply denied the application without comment. However, by stating the reasons for his denial, he very openly shifted the controversy to the executive branch.

The United States House of Representatives weighed in on the Davis question on the very day that Underwood denied the Application for Release of the famous prisoner. George Boutwell, a Republican member from Massachusetts, and a member of the Joint Committee on Reconstruction, introduced a resolution finding that "it is notorious that Jefferson Davis was the leader of the late rebellion, and is guilty of treason under the laws of the United States." Boutwell also referred to the presidential proclamation of May 1865 in which President Johnson linked Davis with complicity in Lincoln's murder. The resolution offered the opinion of the House that Davis should be held in custody pending trial of the case. The allegation that Davis was tied, somehow, to the Lincoln

[4] *Alexandria Gazette,* June 12, 1866 and *New York Tribune,* June 12, 1866.

assassination, prompted Andrew Rogers, a Democrat from New Jersey, to leap to his feet and yell, "the proof is that he had nothing" before being drowned out by cries of "Order! Order!" by other members of the house. Despite the efforts to debate the resolution, the rules were suspended and a vote taken. The Resolution passed 105 to 19.[5] If President Johnson decided to take the initiative to release Davis, his decision would be in direct contradiction to the will of the Radical Republicans in the House.

The defense was not solely reliant upon the judicial track in attempting to secure Davis' release. As with any highly publicized trial, attorneys can attempt to leverage the case on many different fronts. O'Conor began to publicly put pressure on President Johnson to release Davis pre-trial. On June 13, 1866, he and his co-counsel, Thomas G. Pratt, addressed a letter to the President writing that "the State of Mr. Davis' health renders his further imprisonment detrimental, and probably dangerous to his life."[6] Johnson agreed to meet with the two attorneys. On that afternoon, the three men met at the White House for a lengthy meeting, during which the lawyers argued that the military detention of Davis and the rules under which it was administered deprived him of sleep and were ruining his health. Pratt and O'Conor pledged to honor the terms of any parole under which Johnson might order Davis released.[7] Also working hard to secure Davis's release was Horace Greeley, who had made the trip from New York City to Washington, D.C., reportedly seeking to meet with Underwood and otherwise to try to persuade the

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[5] *The Congressional Globe*, June 11, 1866, page 3089.

[6] Charles O'Conor to Andrew Johnson, June 13, 1866, Johnson, *Papers of Andrew Johnson*, 10:583-584.

[7] *The New York Herald*, June 14, 1866, and *New York Tribune*, June 14, 1866.

government to parole Davis. Greeley met with Zachariah Chandler, Senator from Michigan, and Senator Henry Wilson of Massachusetts, and other Radical Republicans, unsuccessfully seeking the release of Davis.[8]

Days after this meeting, a new book was published entitled, *The Prison Life of Jefferson Davis,* ostensibly written by John J. Craven, the Union army surgeon assigned to care for Davis from the date of his confinement at Fort Monroe through December 1865. In fact, the doctor allowed a friend, Charles G. Halpine, to borrow his notes in late March 1866 and ghost-write the book. Halpine wrote to Andrew Johnson after reviewing the doctor's diary. He told the president that Craven was "an old and active member of the Republican party"[9] which would render the sympathetic view of Davis immune to criticism. William Hanchett wrote in 1969 that the book "was about as subtle and truthful as the burlesques and hoaxes of Miles O'Reilly," two of Halpine's well-known works of fiction.[10] But it was not meant to be a work of history; instead, it was written to soften the views of those who hated Davis. Davis, as portrayed by Halpine, was kindly, considerate, and brilliant intellectually, with a fund of knowledge that "was immense and detailed. He was an expert on history, literature, geology, botany, and human anatomy; on navigation and ship design; on ordinance, industry, and engineering; on birds, dogs,

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[8] *Richmond Whig,* June 12, 1866, and *Daily Albany Argus,* June 15, 1866.

[9] Charles H. Halpine to Andrew Johnson, March 20, 1866, Johnson, *Papers of Andrew Johnson,* 10:275.

[10] William Hanchett, "Reconstruction and the Rehabilitation of Jefferson Davis: Charles G. Halpine's *Prison Life,"* 56:2 *The Journal of American History*, (Sept. 1969), 283.

and the Bible; and he like to recite long passages of Milton."[11] As befitting a Southern gentleman, according to Halpine, Davis refused to speak ill of any man. Nor did the rebel waver in his desire to vindicate himself. "In regard to attempts at escape, General Miles might give himself no uneasiness. Mr. Davis desired trial both for himself and cause, and if all the doors and gates of the fort were thrown open he would not leave."[12] Always cognizant of his honor and responsibility, Davis found "the only duty left to him - his only remaining object - was to vindicate the action of his people, and his own action as their representative, by a fair and public trial."[13]

Halpine, writing as Dr. Craven, ended the book by claiming that "it was not my intention to have published this narrative until after the trial of the prisoner; but on submitting the matter to friends, whose judgment I relied upon, it was decided that there was no material in these pages which could bias or improperly interfere with public opinion, or the due course of justice." Yet within two pages, Halpine urges Americans to "let a great nation show the truest quality of greatness - magnanimity - by including him in the wide folds of that act of amnesty and oblivion, in which all his minor partners, civil and military, in the late Confederacy are now so wisely enveloped."[14] Halpine's objective comes clearly into focus in the final pages of his book. "Make him a martyr and his memory is dangerous; treat him with the generosity of liberation, and he both can

[11] Ibid. 284.
[12] John J. Craven, *The Prison Life of Jefferson Davis,* (New York: Carleton Publisher, 1866), 359.
[13] Ibid. 373.
[14] Ibid. 369.

and, we think, will be a power for good in the future of peace and restored prosperity which we hope for the Southern States."[15]

Public opinion plays an important role in the prosecution of criminal cases. While many individuals recognized that the work was a political tract, it played a role in shifting public opinion against the prosecution. Halpine's work was one of fiction, but it was ostensibly authored by a Union military doctor who had unique access to Davis and who grew to admire his character immensely. The case for the prosecution became less popular because of the sympathetic view of Davis painted by the author. Nevertheless, even Davis found the book distasteful. But he must have recognized the value of the book. "Considering the extent to which the book rehabilitated his reputation in the South and won him friends among his former enemies in the North, even a proper Victorian like Davis might have forgiven an admiring friend whose only offense was overly colorful writing and a few minor indiscretions."[16] At least one member of the Davis family believed that the work succeeded in making him a sympathetic character. Joseph E. Davis, Jefferson's brother, wrote to the imprisoned rebel leader that "the prison life by Dr. Craven is I think exerting an influence greater than expected."[17]

[15] Ibid. 374-375.
[16] Hanchett, "Reconstruction and the Rehabilitation of Jefferson Davis," 286.
[17] Joseph E. Davis to Jefferson Davis, July 14, 1866, Davis, *Papers of Jefferson Davis,* 12:153.

James Speed Leaves the Cabinet

Attorney General James Speed was rapidly becoming disillusioned with the Johnson presidency. He had been appointed by his friend, Abraham Lincoln, to the cabinet post and the fourteen months following Lincoln's assassination had not been happy ones for Speed. While his legal skills might be lacking, no one had ever accused Speed of a lack of physical courage. He continued to listen to his own conscience on matters of politics and wrote that "still each individual man must diligently seek to find out what is right and fearlessly pursue it."[18] The Attorney General was politically much closer to the Radical Republicans than to the conservative Johnson.[19] He found himself at odds with the new president on many issues. Struggling with what to do in this situation, he turned to his brother, Joshua, in the early months of 1866, and talked of quitting the cabinet. Joshua Speed offered advice against stepping down. On April 1, 1866, he wrote his brother the following:

> You were appointed by the late President, as a representative man of the party for freedom in the slave States. The country and the party are both satisfied with the appointment. It would grieve those with whose political fortunes our political destiny is linked, for you to quit. While what is still worse, it would gladden the hearts of your enemies. So long as you can with honor, which I know you will never sacrifice, I would advise you to remain; when that cannot be done, I know you will quit.[20]

The Attorney General hung on to his post, but the breach began to widen even further.

Newspapers began attacking the Attorney General. The *Daily National Intelligencer,* located in Washington, D.C., published a letter to the editor, ostensibly from Lexington, Kentucky that Speed "is universally regarded by the Union men of

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[18] Speed, *James Speed,* 85.
[19] *Daily Albany Argus,* July 23, 1866.
[20] Speed, *James Speed,* 89.

Kentucky, and, doubtless, of the whole country, as being thoroughly identified in sentiment with the Radical party, whose leaders in Congress are waging a relentless warfare upon the Administration of President Johnson."[21] Speed was only one of several members of the cabinet said to be either close to resigning or near being pushed out of the Johnson Cabinet. Reconstruction formed the foundation for the split in the president's cabinet. It was serious enough that the *New York Tribune* termed the upheaval "the Cabinet crisis."[22] Clear information was difficult to come by as by July 1866, Washington, D.C. was "full of rumors of Cabinet changes, but there is nothing definite about them."[23] Along with Speed, Secretary of War Edwin Stanton, Secretary of the Interior James Harlan, and William Dennison, Jr., the Postmaster General, were rumored to be leaving the cabinet. As if this was not enough, Gideon Welles noted in his diary in mid-July that Senator Lyman "Trumbull has introduced another of his revolutionary bills to deprive the President of his Constitutional right of removing from office."[24]

Amidst the chaos in the cabinet, Speed's attention understandably was not on the Davis prosecution. By mid-July, under increasing pressure, Speed met with the President and offered his resignation. He told Joshua that on July 12, 1866, "I had a full and frank talk with the President, the result of which was that I am to resign. I would have done so at once, but preferred to give him a day or two to look around for my successor."[25] Speed told his brother that the conversation had been as kind and courteous, on both sides, as he

[21] *Daily National Intelligencer*, July 16, 1866.
[22] *New York Tribune*, July 16, 1866.
[23] *Albany Evening Journal*, July 14, 1866.
[24] Welles, *Diary*, 2:549.
[25] Speed, *James Speed*, 93.

could have wanted, but their differences made continued collaboration impossible. The crux of their differences revolved around the wisdom of the 14th Amendment to the constitution, which Speed supported and Johnson opposed. When the dust settled, Harlan and Dennison had also left the cabinet. Stanton, described by Welles as "selfish, insincere, a dissembler, and treacherous,"[26] remained in the cabinet, ultimately forming the basis for the Johnson impeachment when Johnson forced him from office.

The consequences of Speed's resignation on the Davis prosecution could not be gauged at the time of his leaving the post of Attorney General. It can be said that Speed had intended to personally prosecute Davis. Whether he was a lawyer up to that task can be debated; however, he lent the prestige of the office to the prosecution. He also brought with him to trial a moral certainty of the principled basis for the prosecution, which fuels prosecutors during the long hours of preparation in a major case. It was yet to be seen whether his successor would hold those same principles as solidly as Speed held them.

Henry Stanbery Takes the Helm

It was now October 1866. Jefferson Davis had been in custody for sixteen months. The new attorney general recognized that direction needed to be given on the

[26] Welles, *Diary*, 2:552.

question of what to do with the Rebel president. Henry Stanbery was determined to press the issue before the cabinet. Over the next several weeks, Stanbery sought to gain an understanding of the course to be taken against Davis. So, when President Johnson and the full cabinet met on October 1, 1866, the Attorney General brought up Davis. Stanbery explained that he saw no legal basis to hold the former Confederate president. If he was a prisoner of war, the lawyer reasoned, the war was over and he should not be held by the military. If he not a prisoner of war, then the only other avenue to proceed against him was as a criminal through the courts, yet that process was not being pursued vigorously.

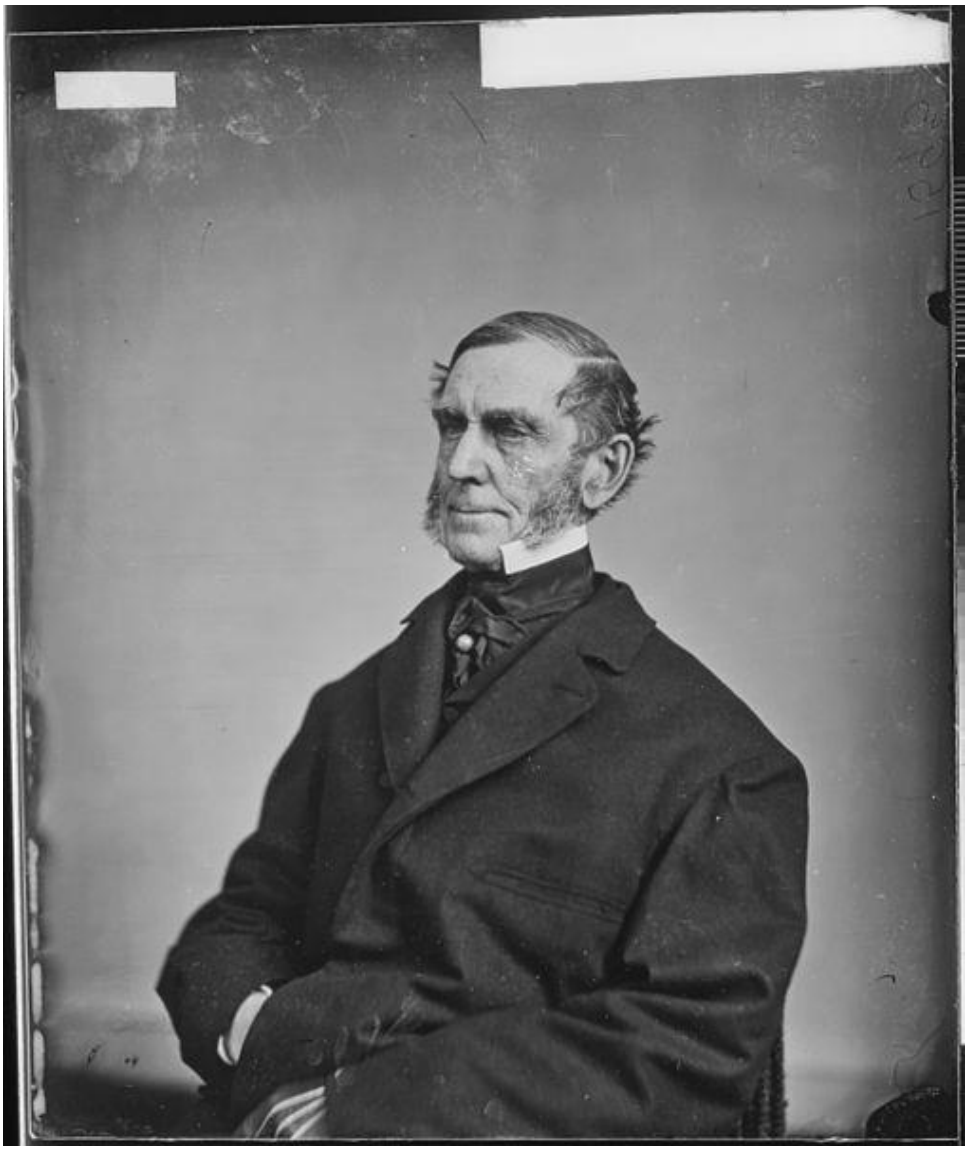

Illustration # 11: Henry Stanbery

Both Seward and Stanton responded to the new attorney general and left no doubt of the ill feelings they harbored towards Davis. The war had taken a toll on the two Union leaders and they viewed Davis as a traitor who had forfeited all of his civil rights by his actions. They began their discussion by pointing out the position set out by Stanbery's predecessor. According to James Speed, they said, Davis was not a military

prisoner, but was only being held in military custody for his own safety. Very early in 1866, Speed had determined that Davis could not be tried by a military tribunal for the crime of treason. However, since Davis was under indictment for treason, he was subject to trial by the criminal courts. The two powerful cabinet members argued to Speed that Davis could be held in military custody for his own safety, even though he was subject to a civil tribunal. At stake in the discussion was not only the speed in which Davis could be tried for treason, which was much slower if he was outside the power of the civil court, but also the department under which he was held. At the time of this discussion, he was held by the military, which was under the War Department and Edwin M. Stanton. If he was moved, Stanton would lose control over him.

Stanbery remarked that the United States District Attorney should then be directed to have Davis brought into the custody of the United States Marshal for confinement. Doing so would place the prisoner under the control of the court and allow the court to dispose of any issues in the case. Edwin Stanton became very agitated at the suggestion. He argued to Stanbery "that Davis had forfeited all his rights - that he had no right to demand anything - we could hold him as long as we pleased - we ought to hold him, and he was opposed to any action in the case at present."[27] Seward indicated that while he had been in favor of Davis being tried by a military tribunal, he was, at present, opposed to any action being taken. Orville Browning, confirmed as Secretary of the Interior as of September 1, 1866, came to the defense of Stanbery and said that he

[27] Orville Hickman Browning, *The Diary of Orville Hickman Browning*, 2 vols., ed. James G. Randall, (Springfield, Illinois: The Illinois State Historical Library, 1933), 2:97.

thought Davis should be transferred to civilian custody. Having heard from four cabinet members voicing opposing views, President Johnson stepped in and said that he agreed with Stanbery and Browning. Davis "should be brought to trial for treason as soon as possible," according to the President. Even after the President told Stanbery what he wanted done in the Davis case, Seward and Stanton argued that even if there was no lawful authority to keep Davis in custody indefinitely, the president had the power to do so and should exercise that power.[28]

The members of the Johnson cabinet were divided on whether Davis should be held in military or civilian custody. As a backdrop of the times, the president and members of the cabinet still viewed another armed conflict as brewing. Conspiracies to overthrow the government were seriously discussed by the president and cabinet. The transfer of Davis from military custody worried Stanton who feared another outbreak of violence, a possibility that was acknowledged by many in the administration. But an important point to remember regarding the decision to try Davis is that Henry Stanbery and Andrew Johnson did not differ in their views. Since Stanbery drew his direction from the president and Johnson wanted Davis prosecuted as quickly as possible, any delay in getting the case to trial cannot be attributed to hesitation or equivocation on the part of the president.

Just days after the cabinet meeting, President Johnson pointed out that "a special term of the Circuit Court of the United States was appointed for the first Tuesday of October, 1866, at Richmond, Va., for the trial of Jefferson Davis on the charge of

[28] Ibid.

treason."[29] He then voiced his concern that it appeared the court would not be in session in October at all and that there was some doubt as to whether November's term would even be held. Johnson was clearly concerned about the delay in the trial. According to Johnson, there was "no good reason why the civil courts of the United States are not competent to exercise adequate jurisdiction" over the case. He asked the new Attorney General to give his opinion if any further action was necessary from Johnson to have the case proceed to trial.[30]

Conversations about the Davis trial between the Attorney General Henry Stanbery and L. H. Chandler, the U. S. Attorney in Virginia also continued. Stanbery met with Chandler near the beginning of October 1866 and asked why Chandler had not requested Davis' transfer from military to civilian custody. Stanbery listened to Chandler's answer and then asked him to put the response in writing. Several days later, Chandler responded in a rather formal reply. "In compliance with your request, I submit, herewith, the substance of the verbal statement I made you, a few days since, in answer to your question, 'Why no demand had been made upon the military authorities for the surrender of Jefferson Davis, in order that he might be tried upon the Indictment found against him in the United States Circuit Court, at the term held at Norfolk, in May last.'"[31] Having answered Stanbery in conversation, Chandler now tried to explain his reasoning in writing. The effort could not have been an easy one, since Stanbery's request that

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[29] Andrew Johnson to Henry Stanbery, October 6, 1866, Johnson, *Papers of Andrew Johnson*, 16:316.
[30] Ibid.
[31] L. H. Chandler to Henry Stanbery, October 8, 1866, *Jefferson Davis Trial Papers*, University of Chicago Library.

Chandler respond in writing must have carried with it the implication that his earlier explanation had not been quite acceptable.

> Two reasons have influenced me in not taking any steps for removing him from their custody. The one relates to his safekeeping, the other to his own personal comfort and health.
>
> I have never had any doubt but that he would be delivered to the United States Marshal for the District whenever he should have demanded him on a 'capias,' or any other civil process. But you can readily understand that so soon as he goes into the hands of that officer, upon any action had by me, his place of confinement would be one of the state jails of Virginia.
>
> At Fortress Monroe all necessary precautions can be, and are taken to protect his escape. Over the internal police of a state jail, the Marshal has no authority, and the safe custody of the prisoner could not be secured save at a very great expense.
>
> Mr. Davis is now in as comfortable quarters as the mass of those occupied by the Army officers at the Fort. The location is a healthy one. His family has free access to him. He has full opportunity for exercise in the open air.
>
> If his health be feeble, remove him to one of the state jails, and his condition, instead of being bettered, would, in all these respects, be much for the worse.
>
> His counsel probably understand all this, and, I think, will not be likely to take any steps which would decrease the personal comforts, or endanger the life of their client.[32]

The Attorney General must have been surprised at the lack of initiative by Chandler. In October 1866, there was no greater criminal charge pending in the entire country than that against Davis. Yet the prosecutor in the case had not asked for his transfer to a facility where he could be prosecuted for the capital offense of treason

[32] Ibid.

because of expense and inconvenience to the accused. The only reason advanced by Chandler that might have made sense to the Attorney General was that a Virginian jail might prove incapable of keeping Davis from escaping without a significant expenditure.

Stanbery revisited the issue at the cabinet meeting a week later. Now armed with Chandler's reply to his questions, he advised President Johnson to order the commandant of Fort Monroe to honor a demand for his transfer to the civilian authorities in Virginia. Stanton predictably opposed this move and argued that it was a mistake to announce to the public that Davis would be transferred to civilian authorities. Stanbery countered by pointing out that the public was being given the perception that the Johnson administration was blocking the trial of Davis and thereby shielding him from punishment. Politically it made sense to clear this misperception up for the public. Stanbery maintained that he "wanted the case placed in its true light, and the courts and the Country informed that Mr. Davis was held subject to the order of the Court whenever it chose to call for him."[33]

Three days later during a cabinet meeting, Stanbery read a letter from the President asking whether there was anything that he needed to do as the Executive to bring Davis to trial, and, if so, for direction as to what steps were necessary. Stanbery let the cabinet know that Johnson need do nothing more than what he had already done. Following Johnson's directions, all the military restraints upon the civil courts proceeding against Davis in Virginia had been withdrawn, and it was Stanbery's understanding that

[33] Browning, *Diary*, 2:98-99.

Davis was now held at Fort Monroe, simply awaiting an order from the District Court in Virginia to be brought before it to answer the pending indictment.[34]

On October 12, 1866, the Attorney General issued a written opinion that "there is nothing in the present condition of Virginia to prevent the full exercise of the jurisdiction of the civil courts."[35] He went on to address the inaction of the legislative branch. "Mr. Davis remains in custody at Fortress Monroe precisely as he was held in January last, when, in answer to a resolution of the Congress, you reported communications from the Secretary of War and the Attorney General, showing that he was held to await trial in the civil courts. No action was then taken by Congress in reference to the place of custody."[36] In a passage that must have frustrated congressional leaders who sought to have Davis tried and hung, Stanbery wrote that Lucius Chandler had "been notified that the prisoner would be surrendered to the United States marshal upon a *capias* [a court order directing an officer to take a defendant to a place as directed by the court] under the indictment, but the district attorney declines to have the *capias* issued because there is no other place where the prisoner could be so safely kept."[37] Stanbery also deftly pointed out that Charles O'Conor had not formally made application to the trial court to have Davis transferred to civil custody. Stanbery's opinion ignored the fact that Chandler had been looking to Washington for guidance and that the local district attorney did not

[34] Ibid. 2:99.

[35] J. Hubley Ashton, ed., *Official Opinions of the Attorneys General,* (Washington, D.C.: W. H. & O. H. Morrison, 1870), 69.

[36] Ibid. 71.

[37] Ibid.

consider himself competent to decide matters involving the trial of Jefferson Davis without specific orders from Johnson and Stanbery.

Stanton noticed the distance that Stanbery sought to place between the Washington office of the Attorney General and the district attorney in Virginia. Sensing that Stanbery would not want to be involved in the trial itself and knowing that the hesitancy of a lead attorney to try a case might delay the proceedings, he insisted that it was Stanbery's duty as Attorney General to conduct the trial in person himself. Stanton also believed that the indictment should be amended to specify the acts of Davis that constituted treason. The Secretary of War held it to be Stanbery's duty to draft a proper indictment, subpoena and secure the attendance of witnesses and present the case against Davis in Richmond. Stanbery responded with a long discussion of his view of the office he held. He believed himself to be the legal advisor of the President and the Cabinet and not a prosecutor. The only court that he needed to appear before was the United States Supreme Court. Davis' indictment was no more important, and no less so, than any indictment pending before United States courts, and he believed it would be improper for him to appear to prosecute Davis personally. Stanton did not hesitate to try to intervene in the business of other cabinet members and the tension between him and Stanbery over the treatment of the Davis case was out in the open.[38]

[38] Ibid.

Davis Awaits Trial

As the tensions rose within the administration on how to proceed against Davis, the ex-rebel's defense team continued their efforts to lobby individuals in the cabinet about the case. William B. Reed, a defense lawyer for Davis, stopped in Washington, D.C. on his way back from Fort Monroe to Philadelphia in order to talk to Orville Browning, Johnson's newly confirmed Secretary of the Interior. Reed warned Browning that Davis' health was precarious and that Davis, if continued in confinement, would not live to see the spring. This claim was made so often by members of Davis' family, friends and defense team that it soon lost its credibility. Reed, however, also lobbied for a general amnesty to be issued by the president on Thanksgiving Day. He found a sympathetic ear in Browning, who nonetheless told him that he did not believe it would be best for a general amnesty to be issued. Browning recorded in his diary that "I have no doubt it would be the best possible thing for the Country, if the Country was prepared to receive it, but it is not."[39]

Reed also sought help for more practical issues. He asked that Davis be given access to the entire fort rather than being confined to a cell from sundown to sunrise. Browning told Reed that he agreed that the confinement throughout the night was unnecessary and then broached an unlikely subject. Browning told Reed that he wished Davis would escape, claiming that "it would be the best thing for us - would relieve us of a great embarrassment."[40] As Davis' attorney, Reed could not advocate his client's escape, and told Browning that the Confederate president would not escape if he could.

[39] Browning, *Diary*, 2:104-105.
[40] Ibid. 2:105.

Browning committed to Reed that he would bring subjects of Davis's continued confinement and a general amnesty to the cabinet and did so the very next day. After a discussion, the entire cabinet voted unanimously to have orders sent to the commandant of Fort Monroe "to extend to Mr. Davis all the liberty, day and night, compatible with his safe keeping."[41] No action was taken on the request for amnesty.

It did not take long for the cabinet discussions to make it to the newspapers. Ten days after Attorney General Stanbery replied to President Johnson, the entire correspondence on the issue was published on the front page of the *New York Herald.*[42] The controversy that Stanton wanted to keep under wraps was now known to the American public. A fissure within the cabinet became deeper. Stanton often found himself at odds with the Attorney General and Secretary of the Interior, who also had the support of the president. Browning began to believe that the Secretary of War "manifestly wanted to do the President an injury," through his advice to Johnson. Browning, for one, had no faith in Stanton, writing in his diary that "he has no sincerity of character, but is hypocritical and malicious."[43] While the fracturing of the Johnson cabinet would eventually affect the Davis prosecution, the work which needed to be done to prepare for the case did not slow.

[41] Ibid.
[42] *New York Herald*, October 22, 1866.
[43] Browning, *Diary*, 2:130.

Underwood Prepares for the Trial

Judge Underwood undertook an examination of the law of treason in the interim. He wrote to George S. Boutwell, a radical member of the Joint Committee on Reconstruction in the House of Representatives,[44] and a former abolitionist governor of Massachusetts,[45] in late 1866 asking Boutwell's opinion about the punishment for treason. Underwood struggled with the two federal statutes on treason, the Act of 1789 and the Act of 1862. Since the Constitution permitted the legislature to set the punishment for treason, Underwood believed it important to reconcile the two statutes.

In the first Congress, legislators passed an act setting punishment for various crimes. Section 1 of that Act provided that any person found guilty of treason "shall suffer death."[46] In 1862, however, Congress expanded the range of punishment for crimes associated with the rebellion. Entitled "An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels and for other purposes," it stated "that every person who shall hereafter commit the crime of treason against the United States, and shall be adjudged guilty thereof, shall suffer death, and all his slaves, if any shall be declared and made free; or, at the discretion of the court, he shall be imprisoned for not less than five years and fined not less than ten thousand

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[44] *Report of the Joint Committee on Reconstruction,* iii.

[45] *Weekly Eagle,* (Brattleboro, Vermont) January 15, 1852.

[46] Joseph Gales, Editor, *The Debates and Proceedings in the Congress of the United States; with an Appendix, containing Important State Papers and Public Documents, and all the Laws of a Public Nature; with a Copious Index,* 2 vols., ed. Joseph Gales, (Washington: Gales and Seaton, 1834), 2:2215.

dollars."[47] The second section of the Act set a maximum punishment at ten years imprisonment for inciting, assisting or engaging in any rebellion or insurrection against the United States or giving aid or comfort thereto. Section 4 reflected the poor drafting of the law. It provided "that this act shall not be construed in any way to affect or alter the prosecution, conviction, or punishment of any person or persons guilty of treason against the United States before the passage of this act, unless such person is convicted under this act."[48] Inexplicably, the law provided that a person convicted *before the passage of this act*, would not have the punishment assessed under that conviction altered, *unless the person was convicted under this act.* It is no wonder that Underwood sought the thoughts of a legislator in the interpretation of the statute.

Congressman Boutwell answered Underwood's letter from Boston on October 30, 1866. Underwood had expressed a concern that the Act of 1789 providing death to be the exclusive punishment for treason may have been repealed by the Act of 1862. Boutwell did not think it mattered. "The first section of the act of 1862 authorizes the death penalty in the case of treason and it is entirely immaterial whether the act of 1789 is repealed or not. The circumstance that the court may impose a milder sentence under the second paragraph of said section, does not limit the power of the court to proscribe or impose the highest penalty - death."[49] Of course, Underwood may have been hesitant to be in the position of determining whether Davis should be executed or his life spared by a

[47] *Appendix to the Congressional Globe*, 37th Congress, 2d Session, Laws of the United States, Approved July 17, 1862, 412.
[48] Ibid.
[49] George S. Boutwell to John C. Underwood, October 20, 1866, *Papers of John C. Underwood,* Library of Congress.

term of imprisonment. Under the Act of 1789 (or 1790 as sometimes referred), that question did not arise; a person convicted of treason would die.

Boutwell urged Underwood to interpret the statutes in combination. The earlier law, he wrote, "defines the proof necessary" for a conviction under the law of treason, while a conviction under the latter act would permit either the death penalty or a term of imprisonment. He closed by writing that "considering the case of Davis, I see no reason why he may not be indicted under the act of 1790 by virtue of the 4th section of the act of 1862."[50] Unfortunately for the Court, the indictment made mention of neither statute while containing language that could arguably limit the punishment to a term of imprisonment. Proceeding under the indictment as drafted by Chandler put Underwood in a precarious legal position, but he had no ability to alter the charging instrument on his own initiative.

Six weeks before the court would open in Richmond, Salmon Chase evidently expressed some concern about his safety during his stay in the Virginia capital. Underwood wrote to Major-General John M. Schofield, the military governor of Virginia, about the concern that Chief Justice Chase expressed regarding his attendance in Richmond. Schofield wrote that "I can not but express my surprise that the Chief Justice should entertain any doubt as to his being cordially welcomed to Richmond, not only by the Army but by all loyal citizens, or that he would receive ample protection if any protection should be necessary." Schofield assured Underwood that Chase would be provided with an escort or guard sufficient for him to safely hold court in Richmond.

[50] Ibid.

The governor wrote that "even without any special guard he would be equally as free from molestation in this city as in Washington."[51] Chase carefully laid the groundwork for his absence in May. Chase's intentions did not slow the work that needed to be done by the trial lawyers. However, not all was going smoothly.

A Writ of Habeas Corpus is Sought

Davis' confinement made it difficult to meet with his attorneys to prepare his defense. The problem was exacerbated by O'Conor's office being in New York while his client was incarcerated in Virginia. Whether the assessment of O'Conor is credible, he certainly was "not altogether willing to trust our mail"[52] and often found different methods of communicating with Davis. O'Conor preferred to have mail sent to him by Davis addressed to a third party in New York City. Even the letter which informed Davis of this method of communication was cryptic. He did not wish to reveal the name of the trusted person in the letter. All that O'Conor told Davis was that "Mrs. Davis has the name of a gentleman in New York to whom letters may be safely enveloped for me." O'Conor did not believe that the federal government was above opening mail to him from the former Confederate president. Still, the system proved less than satisfactory, with O'Conor complaining that he was uncertain whether letters sent through a third party in

[51] John M. Schofield to John C. Underwood, March 30, 1867, *Papers of John C. Underwood,* Library of Congress.
[52] Charles O'Conor to Jefferson Davis, May 23, 1867, *Papers of Jefferson Davis,* Museum of the Confederacy.

Montreal actually reached Davis, despite the system having been set up by the trusted advisor of Davis, Burton Harrison.[53] A reluctance to communicate freely via letters, which did not end with the release of Davis on bail, hampered their ability to prepare a defense and formed another reason why the defense team hoped to have Jefferson Davis released.

With the trial looming, Lucius Chandler went to Washington, D.C. to try to determine whether Chief Justice Chase would be present for the trial. He met Chase on a sidewalk and walked with him to the banking house of Jay Cooke & Company where the former Treasury Secretary needed to transact some business. As they walked, Chandler told the Chief Justice of his objection to trying the case without Chase presiding over the trial. If Chandler's sudden appearance and prying into Chase's intentions caught the Chief Justice by surprise, he did not betray his intentions to the prosecutor.[54]

Chandler had approached Chase on this very subject several times in the past, including once the previous year in Baltimore, Maryland, as Chase sat on the bench. On that occasion, Chandler went into the courtroom and Chase motioned the attorney to the bench where they held a short discussion. When Chandler asked him whether he would be present for Davis' trial, the judge told Chandler that he had no intention of holding court in Virginia so long as the military was in control there. Since President Johnson had removed that impediment, Chase did not use this excuse as he and Chandler strolled from the bank to the nation's capitol building. The best that Chandler could ascertain

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[53] Ibid. Charles O'Conor to Jefferson Davis, June 15, 1867.

[54] Testimony of Lucius H. Chandler, *Impeachment Investigation,* page 508.

from his conversation with Chase was that the Chief Justice could not be in attendance in Virginia before the 20th of May because the Supreme Court would not adjourn until just before that date.[55] Ordinarily, lawyers do not pick judges to preside over cases. Chandler's preoccupation with Chief Justice Chase presiding over the Davis trial certainly was at the critical time prior to trial where an attorney's focus should be completely on the preparation of the case for trial.

Meanwhile, the defense was intent on securing the release of their client and they now tried to force the hand of the government prosecutors. George Shea filed an affidavit with the Court in Alexandria, Virginia on May 1, 1867 to accompany a Writ of Habeas Corpus seeking the release of Jefferson Davis that indicated he had last seen the accused in March 1867. Besides the obvious ground for the writ - that of the length of detention and failure of the government to bring Davis to trial were grounds enough for his release on bail - Shea also argued that the incarceration had greatly impaired the health of his client and that his continued incarceration "through the ensuing summer would involve serious danger to his life."[56] Davis had been imprisoned for two years. Despite Shea having already sworn to the pleading, Judge Underwood took the unusual step to personally administer the oath to Shea, who then re-swore to the facts in the affidavit.

The next day, Charles O'Conor gave formal notice to Henry Stanbery that the Writ of Habeas Corpus had been allowed by Underwood. O'Conor indicated that

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[55] Ibid. 508-509.

[56] Writ of Habeas Corpus, May 1, 1867, *Jefferson Davis Trial Papers*, University of Chicago Library, Chicago, Illinois.

Brigadier General Henry S. Burton, the commanding officer at Fort Monroe, was required to bring Davis to the Court "together with the cause of his imprisonment" for the opening of the Court "to do and receive what shall then and there be considered concerning the said Jefferson Davis."[57] Although the writ demanded that Burton be required to show the basis for Davis's detention, that burden would fall on the United States District Attorney for the District of Virginia. The notice that O'Conor delivered to Stanbery did not request Davis's release, but merely stated that the Court would be requested "to do and receive what shall then and there be considered concerning the said Jefferson Davis."[58] Given that Chandler had seven months previous told Stanbery that he had left Davis at Fort Monroe for Davis's health and comfort, Stanbery must have realized that the strength of the argument for transfer was with the defense.

There was no way for O'Conor to know whether the Writ of Habeas Corpus would be obeyed. Lucius Chandler suggested to Stanbery that they seek Edwin Stanton's involvement.[59] Davis was in military custody and the decision as to whether to comply with the order was up to President Johnson. Stanton, as head of the War Department, held Davis. If the writ was issued by a civil judge and the military refused to honor it, a constitutional crisis would ensue. Andrew Johnson held the power to force a crisis if he chose to refuse the obedience to the writ.

On May 4, 1867, Chandler wrote to Secretary of War Stanton informing him that the Circuit Court would meet in Richmond in May and asking him to issue an order to the

[57] Ibid. Charles O'Conor to Henry Stanbery, May 2, 1867.
[58] Ibid.
[59] Testimony of Lucius H. Chandler, *Impeachment Investigation,* 502.

Commandant at Fort Monroe to "surrender Jefferson Davis to the United States Marshal" on the writ issued by the Court.[60] Now two members of the Johnson cabinet were aware of the Writ ordering the transfer of Davis to civilian custody. This movement by the District Attorney, slight as it was, signaled the government's intention to at least attempt to procure the presence of the defendant in Richmond for his trial date. Without his attendance, no trial could be had; with it, the defense needed to be ready for trial. The filing of the Writ signified the intention of the defense to get Davis released from custody. Two years into Davis' incarceration, it appeared that a trial may be had on his case. If the case was not tried, Chandler knew that an application would be made for bail. It would be up to the prosecution team to either acquiesce in that request or argue against the application.

In the meanwhile, Chandler was in Washington trying to determine whether Davis was legally permitted to post a bond on the charge of treason. The United States Constitution provides that "the Congress shall have power to declare the punishment of treason."[61] As stated earlier, when the punishment for treason was initially codified by the First Congress in 1790, the law stated that a person adjudged guilty of treason against the United States "shall suffer death."[62] In 1862, the Thirty-Seventh Congress revisited the punishment for treason by passage of *"An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other*

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[60] Lucius H. Chandler to Edwin Stanton, May 4, 1867, *Papers of Andrew Johnson*, Library of Congress, [microfilm edition].
[61] U. S. Const. art. III, § 3.
[62] *The Public Statutes at Large of the United States of America*, April 30, 1790.

Purposes." Under section 1 of the act of 1862, treason was still punishable by death. The sentencing court, however, had the discretion to sentence the traitor to imprisonment for not less than five years and assess a fine of no less than ten thousand dollars.[63] The indictment that Chandler had hurriedly drafted did not specify under which statute Davis was charged, so conceivably Davis was subject to imprisonment or death. In Chandler's view, the 1862 law did not supersede the prior act, so the Davis prosecution might proceed under either statute.

That did not answer the question regarding bond. Just days before the court setting, Chandler met with Attorney General Henry Stanbery and William Evarts on the question of the legality of Davis being released on bond. The three men talked about the law on admitting a person to bail. After Chandler produced a copy of Conkling's *Treatise*, turned to the chapter on bail in criminal cases, and read the paragraph on the subject, Evarts agreed with Chandler's take. "The right to bail, I apprehend," he later said, "is confined to cases where death cannot be the penalty. There, I suppose, in all cases the prisoner has a right to be admitted to bail; but where death may be the penalty, it is within the discretion of the court, on the evidence, under the usages of law, and under all the circumstances of the case."[64] If the prosecution intended to keep Davis in custody during the pendency of the case, they would necessarily be forced to argue on the law.

According to Chandler, the Court's discretion on whether to admit Davis to bail would hinge upon three factors. First, the Court would have to consider the evidence.

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[63] *The Statutes at Large, Vol. XII*, (Boston: Little, Brown & Co., 1865), 589-590.

[64] Testimony of Lucius H. Chandler, *Impeachment Investigation,* 504-505.

The defense might argue that Davis did not commit treason by acting as President of the Confederacy, but a grand jury had found probable cause to bind him over for trial on the charge. Judge Underwood could be depended upon to rule that his actions, if true, did constitute treason. A ruling to the contrary would bar the case from being tried, so it would be reasonable to presume that the judge, a radical Republican, would not make that finding. The second factor was the usage of law. In this, the prosecution would have a much more difficult burden. Treason was not a common charge in civilian court. The most prominent man tried for treason was Aaron Burr who had been released on bond by Chief Justice John Marshall,[65] a fact that would make the defense argument for a bond weigh heavier with a judge than a prosecutor's argument against. The third factor, that which would allow the Court to consider all the circumstances of the case, would have proven a compelling argument for the prosecution.

The government's goal in any bond hearing would be to educate the judge on the seriousness of the offense, which in Davis's case was well-known to the Court, and to put on evidence regarding the adequacy of a bond to result in the appearance for trial of the defendant. Davis faced the death penalty if convicted of treason. Chandler might have considered producing witnesses who would be able to testify about the large number of prominent rebels who had fled the United States after the war and who now lived abroad. The argument that Davis might refuse to return for trial was compelling. The argument would have been further bolstered by the fact that Davis was caught trying to flee the

[65] Peter Charles Hoffer, *The Treason Trials of Aaron Burr,* (Lawrence: University Press of Kansas, 2008), 134.

country at the end of the war. Unlike Clement C. Clay, who upon learning of the accusation that he had been accused of conspiring in the assassination of President Lincoln, stopped his flight and immediately turned himself in to a Union military officer, Davis had only been captured after a long and intensive manhunt. If he was inclined to flee then, why would a Court believe that he would return to face a hangman's noose if released on a bond? The prosecution, if it had chosen, would have been able to produce evidence that would have made it extraordinarily difficult for Judge Underwood to release Davis on bond. The question was: would the prosecution either try Davis or fight his release?

Events now began to move quickly. On Monday, May 6, Charles O'Conor summoned Burton Harrison to his office and sent him immediately to Richmond. Traveling through a driving rain storm, Harrison carried with him the writ of habeas corpus for Davis to be brought to Richmond. On Wednesday, May 8, 1867, the writ was filed with the United States District Clerk's Office in Richmond. The next day, Harrison, Robert Ould and the federal marshal began the eighty mile journey to Fort Monroe to serve the writ on General Josiah Burton, the commander of the fort. On that Thursday, former president Franklin Pierce visited Davis at the fort. By Friday, Harrison was reunited with the person he called "Chief." Although the reunion took place in Davis' casement, the awareness that this was the second anniversary of Davis' capture and that he might soon be released was a cause for hope for those present.[66] General Burton

[66] Fairfax Harrison, Editor, *Aris Sonis Focisque: Being a Memoir of an American Family, the Harrisons of Skimino and particularly of Jesse*

received the writ on Friday morning, May 10, 1867, and made plans to travel to Richmond the following day, taking Davis with him.

Davis Leaves Fort Monroe

On Saturday, Davis and his family spent his last hour at Fort Monroe cheerfully meeting with the people who had come to bid him farewell. At last able to smile serenely, he walked leisurely amongst the citizens of Norfolk to the boat. Instead of utilizing a naval vessel, the erstwhile prisoner was loaded into the steamer *John Sylvester*, an ordinary river boat which provided service between the coast and Richmond. Security was not lax - it was non-existent. There were no guards on board, a fact that would belie any claim by prosecutors that Davis posed a continuing danger to the government, and regular passengers mingled with the famous prisoner. Word spread that the ex-rebel was being transported to the capital of Virginia and small groups of Virginians waited to get a glimpse of Davis. At Brandon, Virginia, a reception was prepared for Davis and "ladies came on the boat, embracing and kissing him, weeping, praying and asking God's blessing on him, until we were all overcome with the scene."[67] Many of the women who met with him had been friends of his family during the war.

Burton Harrison and Burton Norvell Harrison, The De Vinne Press, 1910, reprinted by BiblioLife, LLC, 2013, 202-203.

[67] Ibid. 203; *Daily Albany Argus,* May 13, 1867; *New York Herald,* May 12, 1867; and, *Norwich Aurora,* May 15, 1867.

The wharf at Richmond was crowded with hundreds of people despite the morning paper having published a request by authorities that no demonstration be made upon his arrival. From an early hour, a detachment of Union soldiers had been stationed on the avenues leading to the wharf in an attempt to discourage people who had no business at the dock from crowding it for his arrival and many people stayed in town to await his arrival. But those people who were determined to see the ex-president of the Confederacy got around the soldiers anyway. The officer in command was relegated to clearing a large square of the wharf around which the people gathered. As the steamer came into sight and the American flag became evident just after five o'clock in the afternoon, the onlookers became noticeably anxious and tried unsuccessfully to crowd the cleared area. After the steamer was docked, James Lyons went onboard and greeted Jefferson Davis affectionately before escorting Varina Davis, who was attended by two servants, off the boat and into his carriage. After a few minutes, Jefferson Davis, wearing a heavy black overcoat, walked down the gang plank holding on to Harrison's arm. His countenance was much older and feebler to those who had not seen him in two years. Apparently, a full gray beard contributed to the changed look. Harrison complained that the crowd was composed mostly of African-Americans, "some of whom had been instructed, by the vicious Yankee emissaries who are among them, to show their insolence to us."[68]

[68] Harrison, ed., *Aris Sonis Focisque,* 203; *New York Herald,* May 12, 1867; and, *Norwich Aurora,* May 15, 1867.

The hills surrounding the wharves were covered with curious spectators, but the fifty mounted artillery soldiers who escorted the group assured that nothing unseemly occurred. Davis, Burton, Harrison and Surgeon Cooper were taken by open carriage at a rapid pace to the Spottswood Hotel leaving all behind them in a cloud of dust. Along the way, people stood in the street with uncovered heads while women waved handkerchiefs at him from the windows along Main Street. Once at the hotel, Davis found that the proprietors had prepared the same suite of rooms for him that he occupied in 1861 when he came to Richmond as the newly elected president of the Confederate States of America. Again, there were no guards or other constraints on him. That night, he received nearly a hundred of Richmond's most prominent citizens. Davis's activities on Sunday resembled, in no way, those of a man facing - the very next day - a capital trial. Instead, he spent it indoors receiving more people and several bouquets of flowers. Harrison described parts of the day. "The parlor was crowded with pretty women - he kissed every one of them - and I observed that he took delight in kissing the prettiest when they went out as well as when they came in."[69] Elsewhere in Richmond, several prominent men, including Horace Greeley, editor of the New York *Tribune,* had arrived to assist Davis in posting a bond.[70]

A Schism Develops in the Prosecution Team

Chandler immediately wrote to William Evarts, in New York, telling him about the writ of habeas corpus then set for May 13, 1867 and informing him of the importance

[69] Harrison, ed., *Aris Sonis Focisque,* 203 and *Norwich Aurora,* May 15, 1867.
[70] *Lowell Daily Citizen and News,* May 13, 1867.

of Evarts being in Richmond for the hearing. Chandler also asked for a meeting with the New York lawyer before the hearing. Evarts quickly replied that he could meet in Washington the weekend before the Monday hearing but told Chandler that because of his schedule, he would request that he not be asked to go to Richmond on the 13th. Chandler needed to see Evarts sooner than was proposed and Evarts found himself face to face with Lucius Chandler in Evarts' New York City office. Despite being co-counsel on the Davis case for nearly two years, they had never met.[71]

Chandler explained to the surprised Evarts that, having time on his hands, he decided to travel to New York City to confer with Evarts about the writ hearing. They sat in Evarts' office talking about the writ. Chandler told Evarts that no new indictment had been presented against Davis. During the discussion, Evarts found out that Chandler had not drafted a superseding indictment to present to the grand jury then sitting in Virginia. This could only mean that Davis would go to trial on the year old indictment, except that Chandler told Evarts that he did not expect to try Davis on that indictment. The Virginia District Attorney told Evarts that if Davis was to be tried, he would prefer to try him under a new indictment. Evarts could not have been pleased to hear this. The man who was in charge of prosecuting Davis still seemed oddly uncertain of whether the former Confederate president would actually go to trial, even at this late date.

Something needed to be done. Either Chandler needed to be replaced by an attorney who would proceed immediately with the aggressive preparation for the trial of Davis, or Chandler needed to be informed that his only job was to prepare for Davis'

[71] Testimony of William M. Evarts, *Impeachment Investigation,* 645.

immediate prosecution. Chandler told Evarts that he was convinced that the trial would not go forward during this term of the court for the same reasons that Chief Justice Chase had given in the past - namely that a civil trial could not be held in Virginia while the state was still under military occupation. Uncertainty about if or when a case will be tried can often lead to unpreparedness on the part of a lawyer. An attorney who believes that a case will not be tried will find it exceptionally difficult to prepare with the intensity necessary for the proper arrangement of pleadings, witnesses, documentary evidence and argument for a trial. Chandler clearly was not utilizing his time to prepare for the trial of Davis in May 1867.[72]

The Jefferson Davis treason file had been on the desk of Lucius Chandler for precisely two years. During that time, he had not amended the indictment to clearly set out the facts that he asserted would prove Davis was guilty of treason. Without an indictment, Chandler could not possibly know what witnesses, physical evidence and documentary evidence needed to be organized for presentation to the jury to support the allegation of treason. That was why the document was so critical for the government, and perhaps why Evarts was so appalled at the lack of preparation. Of course, the prosecution needed to prepare the new indictment far enough in advance of trial so that the defense could not argue that they were not given proper notice of the amended allegations. For Chandler to have not addressed the indictment during the previous two years was a sign that he should not be leading the prosecution. Even if he was waiting to amend the indictment to put the defense at a disadvantage, he could have been

[72] Ibid. 646.

assembling the evidence necessary to form the foundation of a conviction. He had done none of this. Evarts was clearly stunned.

Evarts later described their exchange as "there being some matters of professional opinion between us regarding the indictment."[73] In fact, the conversation appears to have become very pointed on the issue. But even Evarts was not without blame. He admitted that he had probably not read the indictment at the time he met Chandler in New York; certainly, he had never closely studied the indictment that accused Davis of treason. For a prominent lawyer who had been retained to assist in the prosecution this is a damning admission.[74] Chandler viewed the Davis prosecution from the lens of a politician rather than from that of a lawyer. Since he lived in Virginia and had run for political office from the State, he was concerned with his popularity. His constant need for direction from the administration, while laudable if he was intent on pursuing the case as diligently as he could, was instead a reflection of his unwillingness to take the blame for the prosecution.

Chandler testified in May 1867 before the Judiciary Committee of the House of Representatives. He stated:

> I have been exceedingly desirous, at all times, to know fully what were the views of the administration in reference to that matter [admitting Davis to bail]. I deemed it to be a matter of public concernment. I believed the trial, if it came off, would be one of the most important trials which the world ever saw. I did not think it right that the whole *onus* of the matter should be placed on my shoulders. I thought it right that the administration should give me definite, positive, and precise instructions.[75]

[73] Ibid. 645.
[74] Ibid. 648.
[75] Testimony of Lucius H. Chandler, *Impeachment Investigation,* 505.

Chandler did not view the case as an opportunity. He saw it as a burden. Given his constant need of supervision and his inability to motivate himself to work on the case it is puzzling that the Attorney General, if he intended to see Davis tried for treason, did not replace Chandler as lead attorney for the prosecution.

On Saturday, May 11, 1867, Chandler traveled to Washington, D.C. to meet with his co-counsel, William Evarts and the Attorney General about the case.[76] The subjects discussed make obvious that the prosecution team was in disarray. Evarts, who assumed that Attorney General Stanbery would take the lead in prosecuting Davis, was informed that he had no such intention. It was his view, he told Evarts, that his post did not require him to prosecute any criminal case. This, of course, ignored the fact that the Davis treason trial was no ordinary case, but would be, in all likelihood, the trial of the century. Evarts took exception to Stanbery declining to lead the prosecution. Whether the duties of the office required the Attorney General to take the lead in the case, Evarts told Stanbery "that public opinion, and the duty of the government, in a trial of this nature, will require the Attorney General to lead for it when the trial takes place."[77] Evarts did not persuade Stanbery to change his view. For the first time since accepting a retainer to assist in the case, Evarts now learned that the Attorney General of the United States did not even expect to be in attendance when the trial commenced. The New York attorney did not believe that he had been hired to substitute as first chair for the Attorney General

[76] Testimony of John C. Underwood, *Impeachment Investigation*, 579-580.
[77] Testimony of William M. Evarts, *Impeachment Investigation,* 658.

in the prosecution of Davis and would decline to take the lead now. He believed that he had been retained to be an associate counsel for the government, rendering "the best advice I could to the government on questions either of policy or of law."[78] It must have been a shocking realization for Evarts that Chandler was the lead attorney for the government.[79]

The meeting took a strange twist for the United States Attorney for Virginia, too. Chandler had told Judge Underwood the day before that they were arranging for the trial of Davis. The meeting in Washington, however, did not go well for Chandler. Evarts and Chandler discussed the same issues with Attorney General Stanbery that they had already discussed in Evarts's office. Evarts told Stanbery that he did not see any way that Davis could be tried in May. Too much had not been done that was necessary for the trial of a case. Instead of finalizing the preparation for the trial, it was determined that Chandler had not prepared the case well enough to present to a jury. A decision was made to announce that the government was not ready for trial.

The three lawyers recognized the probable consequences of such an announcement, one of which was that Davis would make a motion for a bond. Evarts examined the question of whether Davis was subject to bond by looking at the statute and decided that unless Davis was subject to the death penalty, he would be legally entitled to a bond. Evarts was told that Davis had been indicted under the Treason Act of 1862, which permitted the punishment of treason to include imprisonment or death. With this

[78] Ibid. 658-659.
[79] Ibid. 658.

understanding, the three believed that Davis would be subject to bail at the judge's discretion. Chandler pointed out that two men indicted for high treason after the Whiskey Rebellion had been granted bail. He thought that the judge would consider the evidence, the usages of the law and all of the circumstances surrounding the case. After discussing this issue, they decided to acquiesce in Davis being bonded out of jail. Despite this case being the most high-profile case in the United States and appearing to not be well-handled, Attorney General Stanbery did not take charge, personally, in overseeing the prosecution. Evarts believed that Stanbery thought the case was the responsibility of Lucius Chandler and did not warrant personal involvement by the Attorney General.[80]

The question then came up of whether treason was a crime for which bail might be set by a court and posted by an accused. Since it was a capital crime, an argument could be made that bond was not permissible, but the men decided not to argue that point. Instead, they discussed the amount of the bond that they should request. Evarts showed himself to be a savvy lawyer. He told the Attorney General that it was his impression that supporters of Davis could raise any amount required to secure his release. If he was correct in that presumption, Evarts contended that the bail should be set at a significant figure but not an extravagant amount. Successfully arguing for a bail amount that was unreasonable and then having Davis' supporters produce citizens willing to meet that bail

[80] Testimony of Lucius H. Chandler, *Impeachment Investigation*, 505, Testimony of John C. Underwood, *Impeachment Investigation*, 579-580, Testimony of William M. Evarts, *Impeachment Investigation*, 646-647 and 653-654.

would only make Davis appear to have more support than the prosecutors would want the public to believe he had. Somehow, the figure of $100,000 seemed high enough to make the charge gravely serious without being so high as to appear oppressive.[81]

An Assemblage in Richmond

Evarts travelled to Richmond on Sunday, May 12, 1867 with no expectation that the treason trial of Davis would begin on Monday. He spent part of the day huddled with Chandler on the case. General Burton, to whom the writ of habeas corpus had been addressed, met with the two lawyers that night. Burton, who likely had no experience with writs, allowed Evarts to draft the return for him. Davis, come the next day, would be transferred from military custody to civilian. Evarts, in drafting the return, made no mention of any basis for Davis to be returned to military custody after he was turned over to the federal judge in Richmond. This effectively ended the possibility, unless further action was taken by military authorities, for Davis to be returned to be tried by a military commission for complicity in the assassination of Abraham Lincoln, an allegation that had previously been alleged to have been a basis for his detention by the military but which had long since crumbled beneath an embarrassing acknowledgment that the evidence upon which the claim was made was perjured.[82]

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[81] Testimony of William M. Evarts, *Impeachment Investigation*, 646.
[82] Ibid. 650-652.

Judge Underwood was in Richmond for the case and spoke to both William Evarts, on behalf of the government, and George Shea, who acted as of counsel to Davis, on that Sunday. Just an hour before midnight on the Sunday evening before the Monday court session, Judge Underwood was visited in his room by Chandler and Evarts. The government was in an embarrassing position. Putting on a brave face, Chandler told the judge that he was ready to try the case and had no doubt but that he would be able to convict Davis. His certainty was not shared by the rest of the government team. Evarts, despite Chandler's confidence, did not contradict Chandler's assertion, but told the judge that the government was not ready for trial. Judge Underwood told the prosecutors the he thought a jury would render a fair verdict according to the evidence presented. But Evarts' conduct in pushing for a delay betrayed his own concern that Davis might not be convicted, or if convicted, might not receive a severe enough penalty.[83]

Chief Justice Chase, whose presence as presiding judge in this trial was hoped for by both the prosecution and defense, had already decided that he could not attend the Richmond court if the trial was held on May 13th. He wrote to Judge Underwood that the business of the Supreme Court detained him in Washington for at least the first two weeks of Davis' trial, but did not request that Underwood delay the start of the trial. Underwood had suggested lodging for Chase that was less than adequate in Chase's opinion. After thanking him for finding the accommodations, Chase wrote that "I do not know that I should care to be in the same house with Mr. Davis, while he and I occupy

[83] Testimony of John C. Underwood, *Impeachment Investigation*, 579-580 and Testimony of William M. Evarts, *Impeachment Investigation*, 648-649.

unpleasant relative positions." Instead, he indicated that "I will thank to request Mr. Chandler to procure suitable quarters for me." The tension between Underwood and Chase was evident by Chase's admonition in a postscript that "I see that the newspapers are well informed as usual. Their correspondent seems to know too much. I take it for granted that you keep your own counsel."[84]

If Supreme Court business detained Chase in Washington, D.C. for the last two weeks of May, it certainly did not keep him longer. By the beginning of June, the Chief Justice found himself in Raleigh, North Carolina opening a circuit court. His trip south, described in a letter as "a very pleasant journey"[85] sounded leisurely and relaxing. In Richmond, he "rode out and visited Gamble Hill, the old residence of the Cabells and thought of pleasant days in Richmond long, long ago." He wrote of going to "Libby Prison and all through it and remembered our brave officers who were confined there" before he went "to the Davis House - the Presidents House of the Confederacy, which Mr. Davis left one Sunday and Mr. Lincoln entered the next Tuesday."[86] Finally, in a month when the Cleveland *Plain Dealer* chastised Chase for his "intrigues for the Presidency,"[87] he remarked that "almost all the leading men of the state are here."[88] The likelihood exists that Chase did not wish to be in the courtroom when Davis appeared.

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[84] Salmon P. Chase to John C. Underwood, May 13, 1867, *The Papers of John C. Underwood*, Library of Congress.

[85] Salmon P. Chase to Janet Chase, June 7, 1867, Chase, *Salmon P. Chase Papers,* 5:153.

[86] Ibid. 5:153-154.

[87] *Plain Dealer*, June 11, 1867.

[88] Chase, *Salmon P. Chase Papers,* 5:154.

Davis Finally Appears in Federal Court

The excitement had not died down when the federal court opened on Monday, May 13, 1867 in Richmond, Virginia. A military guard was placed around the United States Courthouse while a strong police presence was inside the building. The courtroom was packed with interested spectators, many of them women and many African-Americans, waiting for the hearing to begin. The treason trial of Davis could not have meant the same thing to all of these different people coming from diverse backgrounds and having lived so many different life experiences. This much is undeniable, however: the trial was an important drama playing out in the old capitol of the Confederacy. Judge Underwood had denied Davis bail a year earlier and many of Davis' supporters feared the worst. The defense counsel were concerned that Davis would be brought from relative comfort at Fort Monroe only to be ordered to be held in a jail awaiting trial. If he was denied bail, he could conceivably be held at Libby Prison or the Virginia Penitentiary, neither places that any person would want to be confined. While Davis' supporters dreaded such a result, many Northerners could not conceive of him being released on bond.[89]

The *New York Herald* reported that "much is conjectured and little known as to what will be done in the case of Mr. Davis. It does not seem probable that Chief Justice Chase and President Johnson should be playing an idle game of cross purposes in a matter so likely to attract general attention, and so the common notion that they fully understand each other in this matter is doubtless correct. Their understanding will result

[89] Harrison, ed., *Aris Sonis Focisque,* 204; *Norwich Aurora,* May 15, 1867; and, *Boston Herald,* May 11, 1867.

in bringing Mr. Davis into court - and what then?"[90] The newspaper made the point that an important hurdle had been overcome by the transferal of Davis from military to civilian custody. Now the constitutional right of habeas corpus was reestablished and he was subject to the same laws as any person accused of a crime in the United States. But this was as much as was known. The writer speculated that several questions remained. What if Judge Underwood, who the *Herald* claimed was "known to entertain opinions in this case," was to deny Davis bail and the prisoner's defense team turned to the Reconstruction governor, General Schofield, to enforce a right of speedy trial? While the newspaper denied that the court had the power to deny bail since the Treason Act of 1862 did not make the crime exclusively a capital offense, Judge Underwood might not agree that the indictment stemmed only from the Act of 1862 but might rule that the indictment stemmed from the 1790 act under which death was the only penalty. In that case, the government could argue that Davis could not be admitted to bail. All speculation would soon be put to rest.

[90] *New York Herald*, May 12, 1867.

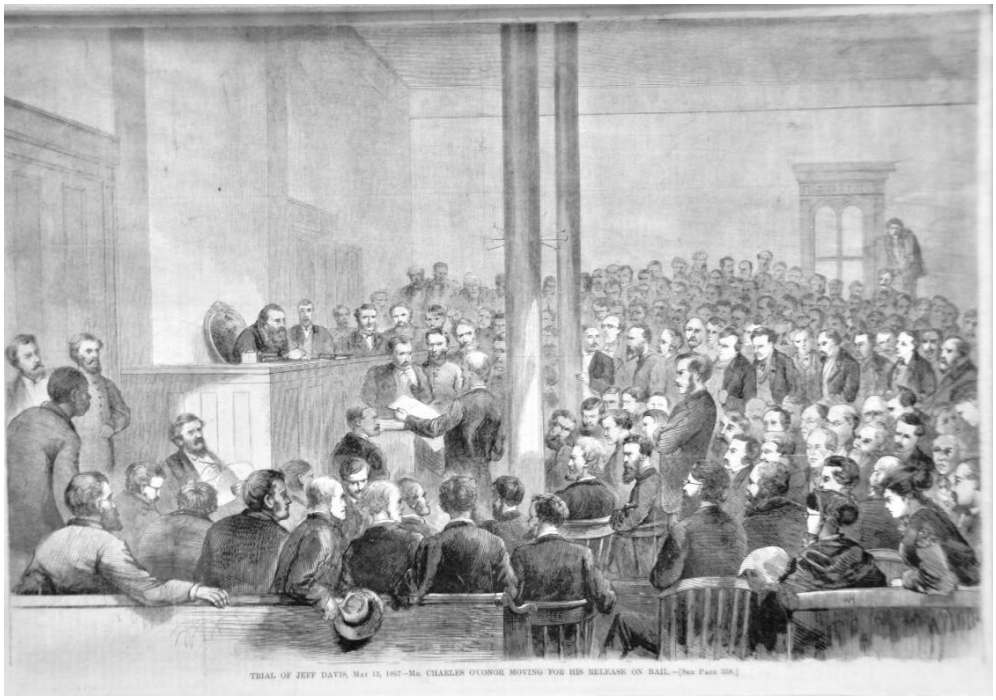

Illustration # 12: Davis habeas corpus hearing

At 11 a.m., the prisoner was brought into the courtroom by General Burton, who was in full uniform, and the United States Marshal, coincidentally, like the judge, named Underwood. The spectators were noticeably anxious but according to one person "kept their excitement under control, however, because everybody felt that an outburst would only compromise Mr. Davis."[91] Davis proceeded to sit next to the prisoner's box. His face was flushed and he looked nervous. The marshal invited Burton Harrison to sit next to Davis so that Davis might have a friend nearby. The return to the Writ of Habeas Corpus was read aloud and Judge Underwood complimented General Burton for complying with the writ. He then relieved the commander of Fort Monroe of the custody

[91] Harrison, ed., *Aris Sonis Focisque,* 204 and *Norwich Aurora,* May 15, 1867.

of Davis. The marshal immediately served the warrant on Davis and took custody of him. Davis and Harrison were then moved to the defense counsel table.[92]

Unknown to the spectators, the lawyers in the case had spoken extensively about how the hearing would proceed. They had agreed that there would be no speeches made and that the arguments of counsel would be kept to a minimum. The prosecution team had assured the defense that the hearing would go well for them, but the radical Underwood made the defense nervous since he still had to render a decision on whether the Davis would be granted bail or simply handed over to the jailers to be held in custody pending trial. The judge was so despised by the defense that they considered him malicious in his attitude towards the defendant. O'Conor rose to address the Court and spoke briefly of Davis' long confinement and unstable health. He asked the judge to grant a bail. It is a longstanding tradition in American law that a person may not be held indefinitely awaiting trial. For two years, Davis had languished in custody awaiting his fate. Now, the prosecution again was not prepared for trial. It would have been very difficult for the government to argue that Davis should continue to be held without bail. They did not attempt to make that argument.[93]

The prosecution, as inept as it had been to this point, perhaps took the smart path in not opposing the prosecution motion for bond. Arguing against Davis being freed would have potentially exposed them to the judge chastising them for their slow

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[92] Ibid.

[93] Harrison, ed., *Aris Sonis Focisque*, 204-205; *Norwich Aurora,* May 15, 1867; Testimony of Lucius H. Chandler, *Impeachment Investigation,* page 505.

movement in the case. After being confined for two years, it would have been very difficult for any judge to rule that he should be jailed while the government continued to prepare the case against him. But by not opposing a bond being set, the prosecution acquiesced in the release of a man against whom they sought the death penalty. In any death penalty case, the public must be convinced that the offender poses a real threat that should result in his death rather than imprisonment. Permitting a man to walk free in a death penalty case was an implicit admission by the government that Davis no longer posed a threat to the government.

Underwood believed that there was an agreement between Evarts and O'Conor on the question of bail. Nonetheless, by the time of the hearing, he knew that a bail had been arranged in the amount of $100,000 for the release of Davis. William Evarts rose and addressed the court. He said that as a representative of the prosecution, he did not intend to proceed with the trial of the prisoner during the present term of the court. The defense team was aware that the government would announce not ready for trial. They had a request for bail ready for Underwood's consideration. Lucius Chandler consented to the judge setting bail for Davis. Evarts, while not consenting, did not object to the request either. Instead, he indicated that the judge would first have to decide whether the charge was one for which bail could be admitted. If it was, then the question of the appropriateness of bail would then have to be decided.[94] Chandler did not have

[94] Testimony of Lucius H. Chandler, *Impeachment Investigation,* 505, Testimony of John C. Underwood, *Impeachment Investigation,* 579, Testimony of William M. Evarts, *Impeachment Investigation,* 652.

instructions from Attorney General Henry Stanbery to consent to the taking of bail, but apparently was not ordered to argue against it, either.

This was a remarkably acquiescent tone for a prosecutor. Certainly, the government could have argued that the delay in trying Davis was reasonable given the seriousness of the charge and the vast amount of evidence that would have to be reviewed for presentation at trial. But the government made no argument that Davis should remain confined pending trial. While the judge seemed surprised that the prosecution was not ready to try the case, since he had been repeatedly assured by Chandler that the government's case would proceed in the May term, he likely was influenced in his decision to grant bail by the fact that the government offered no objection to it being granted. Ultimately, Underwood was satisfied that the $100,000 bond would secure Davis' appearance whenever the trial was held.[95]

But before he entered an order on the bail, Judge Underwood took up the important topic of setting a firm trial date. He announced to the attorneys that he had received a letter from Chief Justice Chase telling him that the Chief Justice would be in Richmond in the first week of June 1867, after the close of the term of the United States Supreme Court. This was significant for two reasons. All parties had expected that a trial of the former Confederate President should be presided over by both Judge Underwood and Chief Justice Chase. This would give the trial a legitimacy and gravitas necessary for a treason trial of a man like Davis. But Underwood's announcement also

[95] Testimony of John C. Underwood, *Impeachment Investigation,* and Testimony of William M. Evarts, *Impeachment Investigation,* 652.

gave the prosecution the notice that they might be able to procure a superseding indictment with the grand jury that was then in session in the Virginia district. If they could get the indictment, there was a possibility that the trial would only have to be postponed a couple of weeks instead of moved to a new term of the court.[96] When the prosecution made no effort to get an early trial date, the judge set the case for the fourth Monday in November 1867.[97]

Judge Underwood now addressed the motion. It was his opinion that bail could be set in a treason case. Since the government voiced no opposition to bail being set, and because the case was yet again delayed because of the failure of the prosecution to announce ready for trial, he ordered that bail be set in the amount of $100,000. Underwood specified that $50,000 must be posted by persons residing in Virginia. He would allow out-of-state persons to post the other half. At this time, Horace Greeley, Augustus Schell of New York came forward to act as sureties, along with other Northern men. After Greeley affixed his name to the bond, Davis, to Greeley's apparent surprise and delight, approached him, and grasped Greeley's hand in thanks.[98] A number of Virginians then came forward to match the amount posted by their former enemies.

Davis was free on bail, his only condition being his promise to return for a November trial date. There is no evidence that either the prosecution or the judge was concerned about Davis remaining within the boundaries of the United States. It was well known that Varina Davis, after her husband had been imprisoned at Fort Monroe, had

[96] Testimony of William M. Evarts, *Impeachment Investigation,* 656.
[97] Cooper, *Jefferson Davis,* 566.
[98] Van Deusen, *Horace Greeley,* 353.

been ordered by the War Department to Savannah, Georgia. Despite her protests, she had been required to remain there, but she had sent all of her children, except her baby, to Canada to live with her mother in July 1865. In the ensuing months, she had kept up her efforts to get authorization to either join her husband or her family in Canada. Finally, in January 1866, she was given permission to live with her family in Canada. In April of that year, she was reunited with her children in Montreal.[99] It was apparent to everyone that Jefferson Davis would, in all likelihood, immediately leave for Canada, and yet there was no provision in his bond that he remain in the United States.

It was a reflection of how much the perception of Davis had changed in the previous two years. In mid-1865, even his wife, who faced no allegations of criminal wrongdoing, was restricted in her ability to travel. Now, the defendant himself, still facing the prospect of a capital trial, was released on a bond with no condition imposed that reflected a concern on the part of the government that he should be restricted in his movements in any way.

Accounts differ of how those in the courtroom reacted to the news. Newspaper accounts indicate that "there was no noise or demonstration of any kind,"[100] while Burton Harrison wrote to his mother that "the courtroom, which had been as still almost as a death chamber, resounded with shouts."[101] What is certain is that several people congratulated Davis and he quickly made his way out of the courthouse to a waiting carriage. There he was met by an enthusiastic crowd of people cheering him and wishing

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[99] Cooper, *Jefferson Davis*, 543-545.
[100] *Norwich Aurora*, May 15, 1867.
[101] Harrison, ed., *Aris Sonis Focisque*, 205.

him well. He pushed through the crowd to the carriage and made his way back to the hotel where he was again faced with a great number of people wanting to greet him. According to Harrison, he and others, including Davis's pastor, made their way into the parlor, closed the door and knelt to pray. "We were all sobbing with tears of joyful emotion."[102] Davis would leave for Canada that night.[103]

The Nation Reacts

The news of Jefferson Davis being released on bail struck many Union men as a travesty of justice, and Underwood began to hear that almost immediately. One man, identified only as "a New Yorker," wrote the federal judge that "there are 10,000 graves of soldiers crying for revenge and he (Davis), a traitor, [is] allowed to walk the streets on his own recognizance. Revenge. Revenge, deep and complete will be carried out on his soul. A traitors doom is Slavery or death."[104] Underwood likely believed that he was required to grant bail to a man who had been held in custody for two years awaiting trial when the government conceded that it was no ready to try him. The realization that the duty existed could not have made the decision to grant bail any easier for the judge, given the understanding that he would be seen as the person who released Davis from jail.

[102] Ibid. 206.
[103] Cooper, *Jefferson Davis,* 567.
[104] A New Yorker to John C. Underwood, May 14, 1867, *Papers of John C. Underwood,* The Library of Congress.

African-American leaders betrayed no surprise in the development. Many had not expected Davis to suffer any penalty for this leadership of the Confederacy. Frederick Douglass claimed in an address in Washington, D.C. that he "had nothing to say even in regard to Jeff Davis, no objection to raise against the mitigation of punishment."[105] But the dynamic speaker went on to say that "Mr. Davis had evinced great qualities; he was a great criminal, he was a wolf, but not a wolf in sheep's clothing, although he was once found with certain other clothing on,"[106] a statement likely to result in great laughter. Not lost in the sarcasm, however, was the clear belief that Davis was a criminal and would escape justice. The release of this "great criminal" would come as no surprise to Douglass.

The Radical Republicans investigating Andrew Johnson immediately shifted the inquiry into the administration's handling of the Davis treason trial. Less than three weeks after Davis's release, United States District Attorney Lucius H. Chandler appeared before the House Judiciary Committee to testify about the government's acquiescence in the request for a Writ of Habeas Corpus and granting of bail. Upset that Davis had been released, several members of the Committee grilled the lawyer about his role in allowing it to occur. Chandler faced hostile questioning. The members were interested in why Davis was transferred from military to civilian custody. "Were you not aware," asked one representative, "of the fact that [Davis] had been arrested in pursuance of a

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[105] Frederick Douglass, "The Issues of the Day," March 10, 1866, *The Frederick Douglass Papers*, 4:122.

[106] Ibid. Of course, Douglass's reference to being "found with certain other clothing on" was a reference to Davis reported being captured in his wife's clothing.

proclamation of the President, charging him with complicity in the assassination of President Lincoln?" The question was critical because the Attorney General had issued an opinion, as has been previously discussed, that persons involved in the murder of Lincoln could be legally tried before a Military Commission. If Johnson had reliable information that Davis had been complicit in the assassination, why was he being moved to civilian custody to be tried for treason? Chandler was hesitant in his answer. "I had supposed that was one of the reasons why he was arrested, but I did not suppose that it was the only reason. I supposed that, apart from the assassination of President Lincoln, Mr. Davis would have been placed precisely where he was on the general ground that he was a traitor."[107]

During the hearing, Chandler testified about three very brief conversations that he had with the president about Davis. The United States Attorney said that he could "never get from him anything other than that the Attorney General had that whole matter in his charge." Chandler explained to the Committee that "I know that on one occasion I was a little persistent in the matter, but still all the answer that I could get was that the matter was entirely within the jurisdiction of the Attorney General, and that I must see him in reference to it."[108] According to Chandler, Andrew Johnson had delegated the prosecution to the proper department head – the Attorney General – and expected that officer to manage the case. Chandler admitted that he had no "instructions" from the Attorney General to acquiesce in Davis being given a bond, but testified that "I thought

[107] Testimony of Lucius H. Chandler, *Impeachment Investigation,* 502.
[108] Ibid. 503.

the Attorney General did acquiesce in his being admitted to bail," remarkably testifying that "this, however, was an inference of mine, not drawn from any language actually used, or any remark made by him." When asked if the administration had ever given him definite, positive and precise instructions regarding a trial for Davis, he simply answered: "Never. The whole matter has been left to me."[109] Chandler's testimony illuminated the strange lack of direction that plagued the prosecution of Jefferson Davis.

New Plans are Made for a Trial

In early October, Charles O'Conor wrote his client that "the appointed day is Nov. 25th."[110] At long last, the trial appeared to be imminent. The lawyer did not lack in confidence; however, every trial carries risk with it. What must have been going through O'Conor's mind at this time? A loss could mean that Davis would be incarcerated for a long time, perhaps the rest of his life, or worse, executed. Varina Davis, always a difficult person to handle, could be depended upon to attribute blame on the lawyer for the loss. O'Conor might go down in history as having lost the single most important case in American history. Yet there existed no room for negotiations. A settlement could not be reached in the case as it might be in many other criminal cases. Davis could not be asked to offer a plea bargain of any sort. The case must be tried, or the federal government must be forced into a position of abandoning the prosecution. Did Davis

[109] Ibid. 505.
[110] Charles O'Conor to Jefferson Davis, October 2, 1867, *Jefferson Davis Papers*, Museum of the Confederacy.

truly understand the risk involved? A trial lawyer reading the letter by O'Conor to Davis recognizes the undertone of the correspondence and the angst being felt by the lawyer as he wrote.

The tone of O'Conor's letter reflected the deep concern that he felt towards the case. He discussed the problems with the case. Many problems existed with the case, from the standpoint of the defense counsel. The first involved the trial judge. "Chief Justice [Chase] must be in Washington Dec. 2. Therefore if a trial shall take place at the appointed term it will be before Judge Underwood." This did not favor the defense. The second issue was the jury. "The jury will be composed of 8 or 9 negroes and 3 or 4 of the meanest whites who can be found in Richmond."[111] Davis must have blanched at the first two issues addressed by O'Conor. Varina Davis, if she was shown the letter, must have been beside herself with fear.

All of the efforts of the defense team, and their supporters, to influence the president or Attorney General to dismiss the prosecution had failed. "I am satisfied that neither the President nor his Attorney General can be induced to do any act or to utter a word bearing upon the subject. The Statute devolves upon District Attorney Chandler the duty of conducting the case, and those at headquarters will not interfere with him!" One of the ironies of the Jefferson Davis case was exposed at this time. O'Conor did not find his opponent, Lucius Chandler, intimidating. He regarded him as a lightweight in the courtroom. But Chandler was not being directed by either Andrew Johnson or Henry Stanbery. In O'Conor's view, they had yielded the direction of the case to Chandler.

[111] Ibid.

"Chandler, poor fellow, does not know what to do and is very anxious. He is to be in New York shortly in order to consult Evarts. No doubt we shall meet." Yet, Chandler's lack of gravitas meant that he would believe that he lacked the authority to dismiss the case, even if he felt it was warranted. Having Chandler make the decision on whether to proceed with the trial of the case increased the potential for a trial because Chandler did not believe himself to be a prosecutor capable of dismissing the case. The defense advantage of Chandler being the lead prosecutor in the case was heavily diminished by the inclusion of William M. Evarts on the prosecution team. Evarts, O'Conor informed Davis, "is deemed *the* great legal gun of the radicals and who really is as good a lawyer as any to be found in the party if indeed he be not decidedly the best." O'Conor believed that Evarts hoped to parlay his work in the Davis prosecution into a judicial seat for himself.[112]

O'Conor gauged John Underwood to lack confidence in his powers, although he thought him to be a radical in the mold of Thaddeus Stevens. Here O'Conor made a stunning prediction: "Of course, he believes that the seceding States read themselves out of the Union and have been conquered. He sees that these premises lead inevitably to your acquittal. It is highly probable that on the opening he would direct an acquittal, laying down formally and sententiously the Thad Stevens law." How could O'Conor believe it to be "highly probable" that John Underwood or any federal judge would direct

[112] Ibid. Evarts later served as Andrew Johnson's chief defense counsel in the president's impeachment trial and was rewarded for his work by being asked to join Johnson's cabinet as United States Attorney General. Brainerd Dyer, *The Public Career of William M. Evarts,* University of California Press, Berkeley, California, 1933, page 101.

an acquittal on the opening of the trial? It is instructive that O'Conor appeared to have such accurate information on Chase and Chandler and yet precious little information on or understanding of Underwood. O'Conor would not have made such a bold prediction had he known that Underwood had engaged in research, less than a year before, attempting to determine whether Davis could face the death penalty as indicted. Far from considering the summary dismissal of the case after the government opened, Underwood was determining his authority to sentence O'Conor's client to death after Davis was convicted.

O'Conor closed his letter with an acknowledgment that he was not in control of events.

> Here is a chapter of uncertainties. The future is absolutely impenetrable; and we can do nothing but prepare our minds and our materials for a confrontation of the enemy at Richmond on the 25th. of November. We must be ready to receive his fire and to return it.
>
> A man can always guess even when it is impossible to assign a reason in support of his conjecture. So I will add my guesses: their value must be judged of by the reader.
>
> 1. I guess the case will not be pushed to trial in November.
>
> 2. I guess when Chandler visits New York a stipulation will be entered into for a continuation of the case to the May term and dispensing with your personal presence at the November term.
>
> I must acknowledge, however, that I have not absolute confidence in either of these conjectures. And we must govern ourselves with reference to an entirely opposite event.[113]

As the year drew to a close, Davis's attorney had no more idea of what would happen to his client than he had when he was initially retained. Davis, predisposed to being nervous anyway, could not have been pleased with this opaque analysis of his future.

[113] Ibid.

The epithets that have been heaped upon us of 'Rebels' and 'traitors' have no just meaning, nor are they believed in by those who understand the subject even at the North.[1] *– Robert E. Lee*

Chapter 7

Fiercely Contesting Every Point

On October 19, 1867, Chandler wrote to Attorney General Stanbery that he had "notified Messrs. O'Conor and Shea of counsel for the accused that the government would be ready for trial" at the next court date, scheduled for November 25, 1867.[2] In the meanwhile, Evarts had brought Richard Henry Dana, Jr., his former Harvard law school classmate, aboard the prosecution team. Neither, Evarts or Dana shared Chandler's confidence in being ready to try the case. Evarts took the unusual step of suggesting to Attorney General Stanbery that "it would be proper to have an associate counsel in Virginia of ability"[3] retained on the case to handle the day to day activity in Davis' prosecution.

Less than a month and a half before trial, Chandler also asked Stanbery for permission to retain General H. H. Wells, an attorney from Alexandria, Virginia, to assist in the prosecution. Chandler assured that Wells was a good Union man who had entered the United States Army at the beginning of the war. More importantly, however,

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[1] Robert E. Lee to R. S. McCulloh, September 28, 1869, Jefferson Davis, *Jefferson Davis: Constitutionalist*, ed. Dunbar Rowland, 10 vols. (Jackson: Mississippi Department of Archives and History, 1923), 7:258-259.

[2] Lucius H. Chandler to Henry Stanbery, October 19, 1867, Jefferson Davis Trial Papers, Box 1, University of Chicago Library.

[3] Ibid. William M. Evarts to L. H. Chandler, February 18, 1868.

Chandler emphasized that Wells was knowledgeable on the law, "a good advocate and one of the best men I have ever known in the preparation of a case. I can see him at all times and thus have the benefit of his advice where it would be out of my power to have an interview with Mr. Evarts. I have no question that the interests of the government would be truly subserved by having the General in the case and should regard it as a great personal favor."[4] In any major trial, there is a great deal of work to be done in the six weeks leading up to trial. However, Chandler's letter is a remarkable document because it has to do with assembling the trial team only six weeks before trial. This aspect of his request makes clear that the prosecution continued to be in disarray.

On October 25, 1867, Stanbery replied to Chandler that he had written a letter to General Wells of Alexandria, offering to engage him as assistant special counsel in the case of the prosecution against Davis. Stanbery also told Chandler that Thomas Evarts had asked, and been permitted, to retain Richard H. Dana, Jr. of Boston as counsel on the case. Stanbery urged Chandler to prepare well for the case. "I need not urge upon you," he wrote, "the necessity of thorough preparation for the trial of this case now so near at hand. If you should desire consultation here, you will advise me in due time, so that I may notify the other counsel to be present."[5] Stanbery's concerns about Chandler's ability to properly prosecute the case jump off the page. The need to exhort an attorney to be properly prepared for the trial of Davis cannot be interpreted in any way other than as revealing Stanbery's deep seated fear that the case was not being managed properly.

[4] Ibid. Lucius H. Chandler to Henry Stanbery, October 19, 1867.
[5] Henry Stanbery to Lucius H. Chandler, October 25, 1867.

His fears must have been heightened by the requests for new and additional counsel only days before the commencement of trial.

A week later, in early November, a meeting was held in Richmond, Virginia involving the prosecution team.[6] William M. Evarts and Richard H. Dana, Jr. memorialized the discussion in a letter written to Henry Stanbery, who was in attendance at the conference. This was the first concrete evidence that the prosecution was not ready for trial. Evarts stated that "we now understand that it is the purpose of the Government that this trial shall be proceeded with when the case can be properly prepared, and the Court having jurisdiction shall be ready to hear the cause."[7] With three weeks left for preparation of the case, counsel for the United States, indicated that the case would be presented when it could be properly prepared. The attorneys asked the court for a delay to be able to prepare their case. This was a damning admission that the past two years had been wasted by the government.

What followed in the letter caused Stanbery grave concern. Evarts wrote that "the first point to which we think attention should be given, as of the greatest importance and responsibility, is the preparation of an indictment, in view of the evidence upon which, and the witnesses by whom, it is to be supported at the trial."[8] An indictment is the charging instrument in a felony criminal trial. The Fifth Amendment to the United States Constitution mandates that "no person shall be held to answer for a capital, or

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[6] Ibid. See William M. Evarts to Lucius H. Chandler, February 18, 1868, for a reference to having met in Richmond, Virginia.
[7] Ibid. William M. Evarts & Richard H. Dana, Jr. to Henry Stanbery, November 2, 1867.
[8] Ibid.

otherwise infamous crime, unless on a presentment or indictment of a grand jury."[9] Besides being a distressingly elementary statement of criminal law, it must have raised questions to Stanbery about the government seeking a new indictment against Davis at this late stage.

Because the indictment sets out the crime alleged to have been committed by a defendant, a new indictment that sets out the manner by which Davis committed treason, or another crime, would likely result in the defense requesting a continuance of the case in order to investigate the new factual allegations in the indictment. Since Davis had languished in prison for over two years awaiting trial, questions from the Court would arise about why the government had waited so long to seek a new indictment. How could it possibly be argued that the prosecution needed more time now to prepare the initial pleading in a criminal case? The other question that would arise is how the public would perceive this new delay.

Stanbery would not feel any better as he read through the letter. Evarts wrote that:

> Although, as we understand, an indictment has heretofore been found, yet neither in framing it as a pleading, nor in selecting the overt acts as the body of the crime, nor in the scrutiny of the evidence by which the averments are to be maintained, has the matter been submitted to the attention of the counsel specially retained for the prosecution. Indeed, so far as this pending indictment has ever been suggested in consultations in which such special counsel have taken part, according to Mr. Evarts' knowledge on the subject, it has always been assumed that whenever the actual prosecution was definitively determined on, the subject of the

[9] U. S. Const. amend. V.

> indictment would need to be taken up, substantially as an original question.[10]

This paragraph is simply stunning. What could Evarts have meant by the phrase "whenever the actual prosecution was definitively determined on?" Did the lawyers for the government believe that the decision on whether to try Davis or not was still not made? Why did Evarts not bring this issue up prior to November 1867? Drafting a new indictment and presenting to another Grand Jury would require time that might not, at this late hour, be available.

Evarts informed Stanbery that he and Dana were not aware of what steps Chandler had taken to draft and present a new indictment. Clearly, there was a communication failure between the local District Attorney and the attorneys hired to assist him. Evarts' tone was aloof.

> We cannot but think, therefore, that the approaching term of the Circuit Court to be held at Richmond will require as the preliminary step towards a trial, the preparation of an indictment and its finding by the Grand Jury. Whenever the District Attorney shall advise us that he is ready to take up this subject we shall give the matter the proper attention.

Evarts' letter strikes the reader as odd in other ways as well. He both pushed blame away from himself and dampened hope that Davis can be tried even in early 1868. "Supposing that an indictment is procured, upon which the counsel of the Government will be ready to proceed to trial, and the presence of the witnesses and documentary evidence is assured, we have to consider no other condition in respect of the time or Term of the

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[10] William M. Evarts & Richard H. Dana, Jr. to Henry Stanbery, November 2, 1867, *Jefferson Davis Trial Papers*, University of Chicago.

Court at which the trial can be brought on, except such as arises in respect of the Court's being able to proceed with the trial."[11] His opinions reflected no urgency to get the case to trial. After over two years, certainly the physical evidence could have been procured.

However, Evarts and Dana then interjected their political opinion on how the case should be tried. Their position on Davis' trial might raise the question of whether they were privy to a changing political landscape in the White House in Washington.

> We feel quite sure that, upon every possible consideration applicable to this question, it is the general judgment of the country, as it is certainly our own, that the Chief Justice should preside in this Circuit at the trial. As his public duties at the Term of the Supreme Court at Washington preclude him from holding Circuit at Richmond at the approaching November term in that City, unless at an adjourned day in the following Spring, we cannot hope that a trial can actually be had until such adjourned day, or at the May Term. We have not heard that the counsel of Mr. Davis have any expectation of anticipating the obligation of his recognizance by desiring a trial on the 13th instant, and we presume that no obstacle will be interposed on their part to the trial being reserved until the Chief Justice will be at liberty to hold the Circuit.[12]

This letter prompted the Attorney General to immediately write to Chandler in Richmond. He sent a copy of their letter along with the admonition that Chandler should pay:

> special attention to the first point referred to in their letter, viz., the preparation of the indictment, and I would suggest that, without delay, you frame such an indictment as you think necessary, and submit it to your associate counsel for revision, and, if deemed necessary by you or them, to arrange for a consultation here either as to the indictment or any other matter which you deem necessary.

[11] Ibid.
[12] Ibid.

Chandler's professional ability must have been in extremely low standing in Stanbery's opinion. While the tone of the letter was civil, the suggestions made by Stanbery could have be seen as nothing less than insulting to an experienced attorney.

> It would be well, besides preparing the indictment, to prepare carefully, an abstract of the proofs necessary to be made out, and of the evidence, or written, which you expect to adduce, and to furnish your associates with such an abstract also for their consideration.
>
> The time fixed for the trial being so near at hand, I deem it proper again to call your early attention to this important subject, and to ask you to acknowledge promptly the receipt of this communication, and advise me what steps you have taken towards the preparation of the case.[13]

This correspondence should have raised a number of questions. If Chandler was so incompetent as to warrant being lectured like a first year associate attorney about how to prepare a case for trial, why had he been placed in the position of prosecuting Davis in the first place? If, after two years as chief prosecutor in the case, he was found wanting, why did Stanbery not remove him from the prosecution team? At the very least, if the case demanded it, why did Stanbery not put Evarts or Dana in charge of the day to day preparation of the case? It is perplexing that Chandler could become the scape-goat for the lack of preparedness in the Davis prosecution and yet still retain that role.

Chandler responded, as instructed, in a letter to Stanbery. He told Stanbery that "the preparation of the indictment has been commenced" after meeting with his new associate counsel, General Wells on the subject. Chandler intended to have a copy of the proposed indictment to Stanbery within a week and hoped to have the suggestions of Evarts and Dana soon after that. He closed with the promise that he would "also attend to

[13] Ibid.

the abstract of the proofs and the necessary evidence."[14] From all appearances, Chandler had found Stanbery's letter to be motivational. It is troubling that there is no hint of displeasure on Chandler's part at having received a letter lecturing him about elementary aspects of trial work.

Privately, the defense team was preparing for trial but expecting the worst. Robert Ould wrote to William Corcoran that "it seems now to be definitely settled that the trial of Mr. Davis will take place about the last of next month before Judge Underwood alone and a jury composed almost entirely, if not exclusively, of negroes."[15] Ould, the former Confederate in charge of prisoner exchanges, found Davis's situation unfathomable. "It is almost impossible to conceive that the Government of the U.S. could descend to such an abyss of baseness as to allow such a proceeding. My opinion that is that we should demand a continuance of the case until Chase will agree to attend. In that matter however I shall have to follow the lead of Mr. O'Conor. The trial will be a very long one." If the jury pool was poor and the judge believed to be biased against Davis, Ould was not prepared to give in. "I am in favor of contesting fiercely every point, beginning with a challenge of the Grand Jury that found the indictment. What will Europe think of trying ten imperial States on the law before Underwood, and on the fact before twelve negroes. Will it not make the name of American a badge of abasement in every circle where honor is reverenced?" Recognizing that the venom in the letter was so

[14] Ibid. L. H. Chandler to Henry Stanbery, November 6, 1867.

[15] Robert Ould to William Corcoran, October 25, 1867, *The Papers of William Corcoran,* Library of Congress, Washington, D.C.

poisonous, Ould apologized near the end of the correspondence. "The events however are so recent and our feelings so deep, that you must pardon me."[16]

The prosecution requested the issuance of two subpoenas on Thursday, November 20, 1867 for the November 25th trial date. General Horace Porter, a member of General Grant's staff had a subpoena issued for his appearance. General George G. Parke accepted service of the subpoena on November 21st in Washington, D. C.

Evarts expected that Chandler and Wells would use the continuance to draft an indictment, present evidence to a Grand Jury, and search through the Archives in Washington for documentary evidence of Davis' guilt. He had also hoped that Chandler would forward to him and Dana the proof that would be included in the indictment and offered as the overt acts of treason by Davis. Evarts waited impatiently for Chandler's work to reach him. When he received no word by January 11, 1868 from Chandler or Wells, he wrote to Chandler expressing his uneasiness in not having heard from the United States Attorney. His letter spurred Chandler to take a hurried visit to New York in the middle of January. During the visit, Chandler left Evarts with a mass of documents, which Evarts claimed to be in no good order, and which Evarts and Dana had previously seen in Richmond in early November. Evarts feared the worst and voiced his concerns to Chandler in a letter that was copied to Stanbery. "We are now within four weeks of the day assigned for the attendance of Mr. Davis for trial, and as far as I am aware, we are in precisely the same position as to preparation that we were in in

[16] Ibid.

November last."[17] Of paramount importance was the looming three year statute of limitations. If a true bill was not returned before the end of the limitations period, the government would be forced to go to trial on the indictment issued in 1866, one which everyone believed to be poorly drafted.

Evarts wrote to Attorney General Stanbery, enclosing a copy of a letter that he addressed to "Chandler in the subject of the pending prosecution against Jefferson Davis and the delays which have occurred in procuring an indictment."[18] He told the Attorney General that "Mr. Chandler will probably confer with you" about the postponement that the procurement of the new indictment would entail.[19] As the most prominent attorney for the United States in the Davis prosecution, Evarts showed little interest in having the case prepared properly for trial. By this time, he was acutely aware that Lucius Chandler was either over his head on the case or simply unwilling to take responsibility for prosecuting the case. Evarts still did not attempt to have Chandler removed from the prosecution team or, failing that, try to minimize the role that the local district attorney would have in the case.

On February 24, 1868, he received two letters from H. H. Wells that informed him that Chandler had fallen ill. He responded that "the main thing <u>now</u>, is to act with promptness and diligence."[20] In the letter he acknowledges that the work which needed

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[17] Ibid. William M. Evarts to L. H. Chandler, February 18, 1868.
[18] William M. Evarts to Henry Stanbery, February 18, 1868, *Papers of William M. Evarts,* Manuscript Division, Library of Congress.
[19] Ibid.
[20] William M. Evarts to H. H. Wells, February 24, 1868, *Papers of William Evarts,* Library of Congress.

to be done would only come with another delay in the trial. It is also implied that Richard Henry Dana, Jr. and Evarts would take the case over at trial. However, the letter also raises another topic which he does not directly address. "I shall be glad to hear from you in advance when we may expect to receive the results of your and Mr. Chandler's examination of the matter, that we may be prepared to give it our attention."[21] Finally, he "directs notice be given at once to Mr. Davis' counsel of the postponed day of his attendance."[22] He was not willing to leave Davis or his counsel in the dark about the inability of the government to proceed in the case. "It is very undesirable that Mr. Davis and his counsel should be called to Richmond only to acquire a further notice that we are not ready to proceed."[23]

Evarts's letter to Wells set out the expectation that Wells and Chandler would examine some issue in the case and send their results to Evarts and Dana for their own review. This could have meant a review of something as mundane as the evidence that would be presented at trial, but since this letter was written in 1868, well into the case, it might also have presaged an opinion that the case was being analyzed with questions being asked whether it should be tried at all.

Evarts's fear in late 1867 was thus proven correct. The government was not able to proceed to trial in March 1868. Judge Underwood approved an agreement between William Evarts and Charles O'Conor permitting Davis to depart while they attempted to hammer out a new trial date. Evarts and O'Conor signed an agreement on March 6,

[21] Ibid.
[22] Ibid.
[23] Ibid.

1868, that permitted L. H. Chandler and either Robert Ould or James Lyons, associate counsel for Davis, to fill in a trial date, allowing both Evarts and O'Conor to escape Richmond. The Court ordered that Davis personally appear at the next trial date "according to the condition of his recognizance."[24]

Illustration # 13: Davis Grand Jury

[24] Ibid. Agreement for Postponement of the Trial Set for March 1868, signed by William M. Evarts and Charles O'Conor, March 6, 1868.

Finally on March 26, 1868, a second indictment for treason was returned against Davis.[25] The grand jury that issued this indictment of Davis had African-Americans as part of the panel. This was unheard of in the South and the defense team would attempt to use the fact to question the credibility of the indictment. However, African-Americans on the grand jury were well educated and sophisticated men. For instance, John Oliver was a free black carpenter who had studied at Oberlin College and Folsom's Commercial College in Cleveland, before teaching school in Massachusetts. He prepared himself for the ministry in Boston but near the end of the 1850s he became involved in the antislavery movement. In 1865, he moved to Richmond, Virginia, intending only to stay until his work as an observer was done. However, the maltreatment that he received and witnessed prompted him to stay. He would later serve as a deputy United States Marshal.[26] However, to Ould and O'Conor, his presence on the panel delegitimized the charging instrument.

Two days earlier, the eleven Articles of Impeachment had been delivered to the United States Senate by the managers of the impeachment proceedings from the House of Representatives. Evarts was summoned to Washington, D.C. On March 8, 1868, he had been beckoned by William Seward to determine whether he would be interested in assisting in the representation of Andrew Johnson in the upcoming impeachment trial. Gideon Welles, for one, was not pleased with the prospect of Evarts joining the defense

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[25] See Appendix C.

[26] C. Peter Ripley, Editor, *The Black Abolitionist Papers*, 5 vols., (Chapel Hill: The University of North Carolina Press, 1992), 5:136.

team. Welles believed that Evarts had recently "abandoned the Administration,"[27] with cause and was a "cold, calculating, selfish man."[28] Two days later at a cabinet meeting Evarts was announced as part of the impeachment defense team. There is no indication that anyone discussed how Evarts, being pulled away from the Davis treason trial only weeks before its scheduled trial, would affect that prosecution. Andrew Johnson's sole focus now was understandably in his own fate. It was incumbent upon Evarts to advise the government that one consequence of him being diverted from the Davis prosecution might have been that the trial of the treason case might be hindered. There is no evidence that he did. His full attention, now, would be on his role as counsel for the president. Evarts, the heavy hitter for the Davis treason prosecution, set aside that case and signed on as counsel for President Johnson in the impeachment proceeding. Until the Senate vote on May 16, 1868 failed to convict Johnson and remove him from office, Evarts would work full time on that case.

Joining Evarts on March 11, 1868, Henry Stanbery resigned his post as attorney general "to stifle any grumbling that he could not faithfully serve both as attorney general and as the president's chief defender."[29] Within days, he was appearing before Chief Justice Chase and arguing the merits of the impeachment of the American president. The loss of Evarts as part of the prosecution team against Davis appeared to coincide with, if not directly cause, the slowing of momentum towards trying the Confederate leader.

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[27] Welles, *Diary,* 3:307.
[28] Ibid. 3:308.
[29] David O. Stewart, *Impeached: The Trial of President Andrew Johnson and the Fight for Lincoln's Legacy,* (New York: Simon & Schuster, 2009), 173.

By this time, Andrew Johnson was much reviled by the Radical Republicans. The very legitimacy of his presidency was challenged in the impeachment trial. Benjamin F. Butler of Massachusetts was one of the House Managers of the impeachment proceedings. Describing Johnson as unfit for the office of the presidency, Butler was not satisfied with that description. He gave a lengthy opening statement that challenged the very legitimacy of the Johnson presidency. "We can say *this man* was not the choice of the people for the President of the United States. He was thrown to the surface by the whirlpool of civil war, and carelessly, we grant, elected to the second place in government, without thought that he might ever fill the first. By murder most foul he succeeded to the Presidency, and is the elect of an assassin to that high office, and not of the people."[30] The impeachment trial of Johnson almost certainly killed the prospect of a Davis treason trial, although it was likely not evident to the individuals involved at the time. Stanton, once the firmest of advocates for a trial, no longer was in the Johnson cabinet. The nation watched as a seemingly dysfunctional government tumbled into infighting between the branches of government. While the momentum of the prosecution had slowed, if it ever had reached a speed which would allow diminution, what was once going to be the trial of the century now took a back seat to the Johnson Impeachment trial. With Chandler diverted, Stanbery resigned from his supervisory post, and Chase

[30] *Trial of Andrew Johnson, President of the United States, Before the Senate of the United States, on Impeachment by the House of Representatives for High Crimes and Misdemeanors,* 3 vols. (Washington, D.C.: Government Printing Office, 1868) 1:119.

now presiding over the president's trial, it is not surprising that the Davis prosecution slid into insignificance.

In February 1868, O'Conor admitted to his client that "I am as yet certain of nothing except that a trial cannot be had sooner than April 6th. It is believed that the Chief Justice will not consent to attend to the trial in April because his whole attention is likely to be taken up with preparations for the Republican Nominating Convention." The convention was scheduled to begin in early May. O'Conor had spoken to William Evarts about the scheduling of the case. The two New York lawyers shared the concern that the case might not get tried in April, and Evarts promised to "go to Washington and strive to get things placed on a definite footing at once."[31] All that O'Conor could tell Davis was that he hoped to know something in a week or ten days about the scheduling of the case. Adding to the pressures of trial preparation was the indictment that was handed down against Davis on March 26, 1868. O'Conor did not receive a copy of the new indictment until April 9th and had not yet been able to do more that give it a cursory look.[32]

[31] Charles O'Conor to Jefferson Davis, February 14, 1868, *Jefferson Davis Papers*, Museum of the Confederacy.
[32] Ibid. Charles O'Conor to Jefferson Davis, April 9, 1868.

The Defense Team Comes Under Pressure

On the very day that the new indictment came down, the Senator Lyman Trumbull introduced Senate Bill 464 in the United States Senate.[33] The bill proposed that the qualification of jurors, in crimes against the United States, be changed to allow that a potential juror could not be struck for cause, or be held to be incompetent to sit as a juror, because the person had formed or expressed an opinion on the matters to be investigated by the grand jury if that opinion had been formed on the person's reading of newspapers and knowledge of history, so long as the person could state, to the satisfaction of the judge, that he could act impartially in his decision. Likewise, a person sitting on a petit jury would not be disqualified from service on the trial of a criminal case simply because he had formed or expressed an opinion, which was not based upon personal knowledge, as to the guilt of the person charged, so long as he could render a verdict based upon the evidence produced in court. Under this law, a judge would have the discretion to disqualify a potential juror if the court was not satisfied that the juror could set aside his opinion.[34]

Senator James A. Bayard, Jr. of Delaware, whose son, Thomas Bayard, was a member of the Davis defense team, thought the bill "dangerous in its principles," because "a man who has formed and expressed an opinion for or against an accused person ought

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[33] *The Congressional Globe, Containing the Debates and Proceedings of the Second Session of the Fortieth Congress,* March 26, 1868, page 2114.

[34] Ibid. April 8, 1868, 2275-2276. During the debate on Senate Bill 464, Senator Reverdy Johnson of Maryland asserted that Chief Justice Marshall had excluded jurors who had formed an opinion in the Aaron Burr treason trial. Johnson did not believe that this was the current state of the law and believed that the bill merely stated the current rules for sitting on juries.

not to sit as a juror in the trial of his cause."[35] The bill passed the Senate by a vote of 37 to 9. There was little doubt that this bill would be seen by the Davis defense team as an effort by the government to pack a jury against Davis, especially since Underwood had testified to Congress that a conviction could not be had without improperly tampering with the make-up of the jury. The very next day, O'Conor wrote to Davis that "it is announced that a bill has passed the Senate to facilitate packing the jury. This measure was initiated more than a year ago. I have long expected it. It is no doubt, unconstitutional; but Chase and Underwood will decide otherwise."[36] Davis himself thought that "the prospect of any thing approaching a fair trial is certainly bad."[37]

Meanwhile, the nation's press began to circulate rumors that Southerners were urging Davis to stay in Canada and not appear on his bond. Henry A. Wise, former governor of Virginia, found the suggestion absurd. "No man dare to approach Davis with any such proposition," Wise was reported to have remarked, since "his great pride of character and a high sense of honor would scorn the idea."[38] If the idea of Davis jumping bail appeared ridiculous to Wise, Charles O'Conor worried that Davis just might do that. "Nothing would so much delight the enemy as your failure to appear. This is so desirable to them that they would be very sure to add their whispers if they thought you could be deterred from coming by such means. I cannot say that I impute to them anything that

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[35] Ibid. 2276.
[36] Charles O'Conor to Jefferson Davis, April 10, 1868, *Jefferson Davis Papers*, Museum of the Confederacy.
[37] Davis, *Papers of Jefferson Davis*, 12:289, Jefferson Davis to James M. Mason, April 16, 1868.
[38] *Daily Eastern Argus*, April 24, 1868.

has been said, for I sincerely believe that the meanest among them does not suspect you of capacity to do a dishonorable act or of any inclination to shirk from personal hazard."[39] O'Conor raised the issue again in April 1868 as the trial approached. "The *Herald* is vehemently urging that you pay the $110,000 and keep out their way. I presume you get it and need no advice from any quarter on a point like that."[40] Despite later assertions that the Confederate leader was anxious to be tried, his attorney sensed the need to write to him about not forfeiting his bond by refusing to appear for a trial setting. O'Conor's messages to him about this subject make much more sense in the immediacy of the moment; it is difficult to imagine anyone wanting to attend a trial which might result in their hanging.

As the latest trial date approached, O'Conor began to show the tension associated with the trial of a major case. Much of the aggravation stemmed from the seeming inability to get a firm trial date. After being set for April 14, 1868, Judge Underwood told defense counsel in mid-March that the case would not begin on that day. Instead, Underwood entered an order on April 2 continuing the case until the last day of the court's term, Saturday, May 2, 1868. Unable to contain himself, O'Conor wrote to Evarts asking for an update on the schedule. On April 10th, O'Conor wrote to Davis giving him "positive information that Saturday, May 2, is the day. No doubt you get the papers and you may think it strange that whilst the *Herald* of Apr. 6 contained a copy of the order of the Court purporting to be entered on the 2nd I should remain uncertain until

[39] Charles O'Conor to Jefferson Davis, November 13, 1867, *Jefferson Davis Papers*, Museum of the Confederacy.
[40] Ibid. Charles O'Conor to Jefferson Davis, April 10, 1868.

the 9th that the fact is so."[41] O'Conor tried to glean accurate information before he conveyed it to his client but the notoriety of the case oftentimes resulted in publication of information that the lawyer did not believe trustworthy enough to rely on. His letters to Davis take on a slightly different tone that may reflect a concern on his part that his client might not have complete confidence in him after all the delay.

Months before, William Evarts had told his New York opponent that he would try to figure out when the case would actually begin. Now he was in the midst of Johnson's impeachment trial but still concerned with the pending Davis treason trial. He had spoken to Chase about the scheduling but gleaned nothing from their conversation. In mid-April, he wrote to O'Conor admitting that "I am not able to give any very trustworthy impressions as to what may need to be done in the Richmond case, but I will try for my own comfort as well as yours to form some judgment on the subject and give you early information of the expectation."[42] He did admit to O'Conor that he did not want to be forced into the treason trial immediately on the heels of the impeachment trial. If that consideration came into play, then Davis's trial would be postponed even further into 1868. O'Conor wrote his own note to Davis on Evarts' letter and forwarded it to him. This odd manner of communicating with his client reveal O'Conor's fear that Davis might be skeptical about his attorney's inability to know, with certainty, when his trial was to begin. Davis proved to be a very nervous client and his wife, Varina, was not only a high-maintenance client's wife, but at times attempted to take matters into her own

[41] Ibid.

[42] Ibid. William M. Evarts to Charles O'Conor, April 14, 1868.

hands, a lawyer's worst nightmare. By sending Davis the Evarts letter, O'Conor must have hoped that his client would be satisfied that nothing else might be found out about the trial date. "It's not likely that we shall be any better informed until we meet in Richmond on Saturday, May 2. I will probably send you a printed copy of the new indictment in a day or two."[43]

The case was now nearly three years old. Whatever momentum the prosecution possessed after the war to prosecute rebel leaders was almost completely gone. "We no longer desire to hang Jefferson Davis, or even John Surratt,"[44] declared the *Atlantic Monthly* in the May 1868 issue in an article half-humorously pointing out how the nation had changed since the end of the great war. Indeed, the country's attention was now gripped by the collision between the Executive and Legislative Branch in the impeachment proceedings initiated against President Johnson. Chief Justice Chase, moreover, found the spotlight that he would have presiding over the president's impeachment trial much more alluring than that of a treason trial of the former Southern chieftain and the potential that he might encounter in alienating Southern voters in his anticipated run for the presidency.

Salmon Chase had never lost his zeal for the presidency even after he was appointed to the Supreme Court. In the midst of this election year, notice was taken that he had begun politicking for that office. The potential that a presidential bid might call into question Chase's judicial impartiality did not escape notice.

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[43] Ibid. Charles O'Conor to Jefferson Davis, April 17, 1868.

[44] *The Atlantic Monthly*, May 1868, 629.

> Judges have not simply to consider the effects of their conduct on their own character - they have to consider also the effect of it on the popular confidence in the administration of justice. It make little difference how pure a judge is if people do not think him pure, and people will not think the Chief-Justice or any other judge pure who, while on the bench, is working for a nomination. It is not necessary, and not desirable, that a man should always act with a view to promoting the general weal; but it is well established that the effect on the general weal of a particular line of conduct, if generally followed under similar circumstances, is a proper test of its quality; and if the Chief-Justice will ask himself what would be the effect on the community of all judges doing what he is doing, we feel sure he would be at least inclined to leave it off. Whether he *would* leave it off, depends on other circumstances.[45]

Adding to the ethical question surrounding his quest for the nomination was that Chase sought the Democratic Party nomination after years of being a Republican. Since everyone on the Davis defense team were Democrats and the vast majority of the South was Democratic, the question of whether politics would play a role in Chase's handling of the treason trial became a concern for those seeking a conviction.

Although the case could not be started on the last day of the court's term, Underwood's order required that Davis "appear personally before this court, according to the condition of his recognizance."[46] The requirement that Davis travel to Richmond for that court date may not have appeared significant to the public, but signaled to the attorneys involved that the case would be brought forward for trial on Monday, May 4, 1868. Undoubtedly, O'Conor had cleared his calendar for the April 14th trial date and must have begun his final preparation in the days in advance of that trial. Now, facing a new indictment and a client that he may have feared was losing faith in him, he had to

[45] *The Nation,* July 2, 1868.

[46] *New York Herald,* April 6, 1868 and J. H. Carrington to Jefferson Davis, March 24, 1868, *Jefferson Davis Papers,* Museum of the Confederacy.

clear the month of May and rearrange his calendar based on this latest order entered by Underwood. For the busy lawyer, the trial preparation and change in scheduling of the case drove O'Conor to the brink of explosion.

The pressure of the case was immense and pre-trial details that escaped the public's eye had the attention of Davis's defense counsel. Robert Ould of Richmond, acting somewhat in a role as local counsel for Davis, took on the task of evaluating potential members of the Davis jury, since neither O'Conor nor Thomas Bayard hailed from Virginia. Since potential jurors needed to be summoned to federal court well before the trial date, their names became available to counsel before that date. Information about the men who would be called to sit on the jury was immensely valuable. Ould sent Bayard a list of forty-seven men from whom the jury would be drawn. Of particular concern to the Davis lawyers was that nineteen of the men were African-Americans. O'Conor's personal dislike of the race, combined with the obvious problem of having African-Americans sit in judgment of a man who had led eleven states in a war to preserve the rights of slaveholders, made the anticipation of trying the case before these jurors a very unfair prospect to the defense.

The Richmond lawyer noted three characteristics of the potential jurors that might be of assistance to O'Conor. First, he carefully divided the men by city. Since this was a federal case, the jurors would be drawn from well outside of Richmond. Second, he made a mark "opposite to such as are known to be conservative, with a cross as to such as are well known to be to decidedly such." Ould did not know anyone listed from outside of Richmond but indicated that he would enquire about the other men so as to be able to

recognize "our friends." Third, "the whites are marked 'W' and negroes 'C,'" he told Bayard.[47] Jury selection is critical in any trial. Since each individual brings a unique point of view and personal experiences to the jury box, getting an idea of the background of the individual prior to the jury selection is important.

As he departed New York City, he stopped by the offices of the New York Tribune to talk to Horace Greeley. Unable to find him, O'Conor penned a quick letter to the publisher. He admitted that despite being set for May 2nd, the trial of the case was likely to be postponed because of the Johnson Impeachment trial. His anger spilled over. "There is something very contemptible in the way this case is treated by those who direct the prosecution. It is abuse, oppressive and humiliating, to me to be left playing tail to the kite of some persons of little significance who have control over it. I am pretty patient always, have been extremely so in this case, but my patience is exhausted." He then got to the point of his letter. He asked Greeley to "give me an introduction to any influential persons on your side and effectively advise them to give me and my reasons a favorable audience." With the prospect for a trial slipping away, once again, O'Conor was willing to turn to anyone who he believed might be able to assist him in getting Davis to trial, even a man of opposing political views like Horace Greeley. As if to cement his reputation for social awkwardness and a remarkable lack of tact, he tried to explain to Greeley why he had taken the unusual step of writing to him. "I write because you and Gerrit Smith have behaved like men of high and honorable sentiments. For any

[47] Robert Ould to Thomas Bayard, April 24, 1868, *Papers of Thomas Bayard*, Library of Congress.

other member of your party, I have nothing to say touching this affair that is in any degree creditable."[48]

Arriving in Washington, D.C. at the very end of April, O'Conor immediately set out to see if the trial would actually begin in early May. He met with his co-counsel, Thomas Bayard. O'Conor must have still been in an agitated state because he later complained to Bayard that they were not able to openly discuss the Davis case because of the presence of a stranger. The two lawyers set an appointment and agreed to meet later in the day. O'Conor then left in his quest to talk to someone who could give him an answer about whether the trial would begin. Within a half-hour of leaving Bayard, O'Conor must have met up with William Evarts and found that the trial would not take place in May. They hammered out several important agreements. First, the trial would be postponed until June with the understanding that even that date would be moved to November 1868. Second, new sureties would be permitted to be posted on behalf of Davis. And, finally, Davis would not have to personally appear for court.

In his typical fashion, O'Conor wrote to Bayard from New York, explaining to him that "it then appeared that by starting within the hour I could return immediately to New York and save much time. Hence my non-appearance at the appointed hour when I hoped to have the pleasure of seeing you and explaining many things while participating in your hospitality. A multitude of details had to be despatched and the most important were prevented, i.e. a letter to you excusing my failure to call and a telegram to Mr.

[48] Charles O'Conor to Horace Greeley, April 24, 1868, *Horace Greeley Papers,* New York Public Library.

Davis."[49] O'Conor's lack of manners did accurately convey his thoughts. His time was more valuable than anyone else's and Bayard would have to comfort himself knowing that he was playing second fiddle to the much more important defense lawyer from New York City. The opportunity to work with O'Conor and help try the Davis case undoubtedly seemed to adequate compensation to O'Conor for the aggravating slights with which he had to deal.

But the prospect for trial slipped away once again, and O'Conor wrote to his client to explain that the case was reset until the November court term. Davis was in England. His absence would have potentially created problems, since his presence would have been mandated by the bond conditions, if the trial had gone forward. However, the likelihood of a trial was apparently very slim. O'Conor confessed that "it is not probable that I shall be able to learn anything about the course to be adopted by the prosecution until we are on the verge of the term."[50] The leader of the Davis defense team had no better idea of when his client would go to trial than anyone else. The ex-president of the Confederacy remained in legal limbo. Still, with Davis out of jail, delay would not hurt the defense.

[49] Charles O'Conor to Thomas Bayard, Jr., April 29, 1868, *Bayard Family Papers,* Library of Congress.

[50] Charles O'Conor to Jefferson Davis, August 1, 1868, *Jefferson Davis Papers,* Museum of the Confederacy.

The Prosecution Team Dissolves

Chandler's term as United States Attorney for Virginia was set to expire on June 30, 1868.[51] He had been nominated for Congress by the Republican Party earlier in April[52] and apparently had no intention of seeking another term as United States Attorney. In addition to his term expiring at the end of June, his wife, Susan, died early that month.[53] The death of his wife and his run for Congress likely left him little time to concentrate on the Davis trial which was now set outside the term of his office anyway.

President Johnson would have to find another attorney to prosecute the former Confederate president. The change could not have hurt. Chandler's popularity with the non-Radical white population of Virginia had sunk to new lows. Shortly after leaving office, he attempted to get a drink at a hotel in Jerusalem, Virginia, and "was accosted by an ugly crowd shouting insults, groans, hoots, and hisses at the 'white negro' who allegedly favored 'political, civil and social equality' for blacks."[54] The office would remain vacant for a month after Chandler left it.

The prosecution suffered a major setback in June 1868 when President Johnson offered the office of Attorney General to William Maxwell Evarts. The Senate had rejected Stanbery's nomination as Attorney General on June 3, 1868, when Johnson had attempted to get him back into his cabinet.[55] After Johnson's initial choice, Benjamin R. Curtis, declined, the president asked Secretary of State, William Seward, to meet with

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[51] *Richmond Whig,* June 9, 1868.
[52] *New York Herald,* April 29, 1868.
[53] *Richmond Whig,* June 12, 1868.
[54] Daniel W. Crofts, *Old Southampton: Politics and Society in a Virginia County, 1834-1869,* (Charlottesville: The University of Virginia Press, 1992), 261.
[55] Welles, *Diary,* 3:375.

Evarts in New York City and tender the post to him. Evarts considered the offer for over a week before writing to Johnson to accept.[56] Despite Evarts's immense prestige as a lawyer, not everyone was pleased with the nomination. *The Nation* opined that "the nomination of Mr. Evarts for the Attorney-Generalship, though good for the country - for we know of no one who would make a better Attorney-General - will hardly help Mr. Evarts's reputation. The office has not gained in dignity under Mr. Johnson, and nearly every reason which warranted Mr. Evarts in acting as his counsel in the recent [impeachment] trial militates against his accepting office at his hands."[57] From the standpoint of the Davis prosecution, with Evarts undertaking the new responsibilities of the office of the Attorney General, the ultimate responsibility of the prosecution devolved upon him. The question remained whether he would pick up the work, once again, on the case. What was certain was that his new duties at Attorney General, even if he chose to involve himself personally in the prosecution, would surely reduce the time which he would have to work on the treason trial. Organizing the office, getting up to date on the issues confronting the Attorney General and keeping up with the immense work load of that position almost assured that the Davis prosecution team would lose the hardest hitting lawyer on the government side.

The potential loss of Evarts to the prosecution did not mean that the case would not be tried. Certainly, the defense was convinced that the case would proceed to a

[56] Johnson, *Papers of Andrew Johnson,* see William H. Seward to Andrew Johnson, June 11, 1868, 14:199 and William M. Evarts to Andrew Johnson, June 20, 1868, 14:239-240.

[57] *The Nation,* July 2, 1868.

verdict. Through his conversations with Evarts prior to Evarts moving to Washington, D.C. to assume the duties of Attorney General, Charles O'Conor had come to the conclusion that Evarts hoped to abandon the prosecution. O'Conor noticed a dramatic shift in Evarts' attitude on this point after the move. He surmised that Evarts had been unaware of the strong feelings of William Seward, Evarts' close supporter and friend, that the Davis treason indictment should be prosecuted. In the last talk that O'Conor had with Evarts prior to the scheduled November hearing, Evarts admonished the Irish-American defense lawyer "that there was no just ground to hope for a voluntary abandonment of the prosecution." O'Conor replied that he had never expected leniency so long as "a particular individual to whom my evidences pointed, had power to keep it on foot." The person to whom O'Conor obliquely referred to was Seward. Evarts reminded O'Conor that the President had famously pledged to make treason odious, to which O'Conor replied with his belief that "the prosecution was not attributable to Mr. Johnson's personal wishes nor to his pledges or outgivings concerning treason."[58]

On July 1, 1868, the cabinet met and listened to a draft proclamation for general amnesty. It had been prepared by William Seward. It excluded persons under indictment. Gideon Welles was perplexed by this exclusion and "asked how many there were under indictment."[59] Only John Surratt and Jefferson Davis were remaining under indictment, according to Seward. "Why prolong this unhappy controversy," Welles inquired, and pointed out that Surratt was charged with a crime and only Davis was now

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[58] Charles O'Conor to Jefferson Davis, December 7, 1868, *Jefferson Davis Papers,* Museum of the Confederacy.

[59] Welles, *Diary,* 3:394.

under indictment for treason.[60] Andrew Johnson agreed that only Davis was left out of the proposed amnesty proclamation. The president asked for his cabinet members to "consider the subject of an unqualified amnesty to all, without any exception."[61] By the very next day, Johnson met with Welles and Orville Browning to discuss the unqualified amnesty. "Browning thought this was a mistake, said they would try again to impeach. The President wished to know if they would frame an article based on his amnesty."[62] Welles told Johnson that the question of amnesty, and the risks associated with it, could only be answered by the president himself. The question was whether it was expedient to do? In asking this, however, Welles made the point that "there was this fact: if Jeff Davis was tried and not convicted, we should have a strange and unsatisfactory result."[63] Then Welles posed a final question: "could he be convicted by any jury where he can be legally tried?"[64] Johnson was on the precipice of granting a general amnesty but hesitated, in part, because of his fear of retaliation by the Radical Republicans.

Political events began to move quickly. By July 9, 1868, Chase's bid for the Democratic Party presidential nomination was over. The party nominated Horatio Seymour. The election of 1868 would then pit Ulysses S. Grant as a Republican nominee against Seymour. Andrew Johnson had only eight months left as president. On July 21,

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[60] Ibid. 3:395. This was not quite correct information. The 1865 indictments against Lee and many others were still pending in Richmond, Virginia. However, there was an understanding that they would never be proceeded upon.

[61] Ibid.

[62] Ibid.

[63] Ibid. 3:395-396.

[64] Ibid.

Evarts made his first appearance as Attorney General at a cabinet meeting. It was unclear whether he would consider it his duty to try Davis personally or permit Richard Henry Dana, Jr. to do so. Discussions within the administration reveal that the motivation to try Davis was slowly coming to a halt. Stanton was no longer present to urge the personal involvement of the Attorney General in the trial.[65]

When it became evident that Chandler was not to seek, or receive, a re-appointment, forty members of the Richmond bar wrote the president seeking to influence him in his appointment. They wanted him to appoint Thomas R. Bowden, the Attorney General of Virginia, to the post.[66] President Johnson declined to follow their recommendation. Instead, he chose to nominate S. Ferguson Beach, described by the *Alexandria Gazette* as "an able lawyer, in this city, where he has resided since early manhood, [and] has always been a Union man."[67] With the congressional session coming to an end, Beach was confirmed on July 26, 1868, just days after his nomination.[68]

The Republican Congress recessed for two months the next day. Ordinarily, Congress would have adjourned *sine die*, or without a specific day to reconvene, and then come back into session only at the regular session in December. Instead, they called a prolonged recess until September 21, 1868. Welles believed it to be done as an encroachment on the president's right "to convene Congress, if public necessity

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[65] Ibid. 3:409.
[66] *Alexandria Gazette*, June 30, 1868.
[67] Ibid. July 25, 1868.
[68] Ibid. July 27, 1868.

requires."[69] As support for his opinion, Welles noted in his diary that the Radicals "signed a paper to the purport that they would not convene in September unless called together by E. D. Morgan, Senator, and Schenck, Representative. These two men are chairmen of the Radical party committees of their respective houses, and on them was conferred the executive authority of calling an extra session for party purposes. Such is Radical legislation – and Radical government."[70] Radical Republicans would not trust Johnson enough to give him four months without legislative oversight.

Near the end of August, Richard Henry Dana, Jr. penned a letter to Evarts from Boston. The letter expressed, quite remarkably, the deep ambivalence that the government attorneys had towards the trial of the case. Just two months away from trial, Dana confessed that the doubts that he had harbored about trying Jefferson Davis "have so ripened into conviction, that I feel it my duty to lay them before you in form as you now hold a post of official responsibility for the proceeding."[71] The two lawyers had talked privately about whether Davis should be tried at all from the time when Dana was first brought aboard to assist in the trial. Now, Dana felt compelled to set forth the reasons why a trial was not in the interest of the federal government. His letter forms the best evidence of what the lead prosecutors of Davis thought, in late 1868, about the legal and practical sides of the litigation.

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[69] Welles, *Diary,* 3:415.

[70] Ibid. 3:415-416.

[71] Richard Henry Dana, Jr. to William M. Evarts, August 24, 1868, *Johnson Papers,* LOC, [microfilm edition].

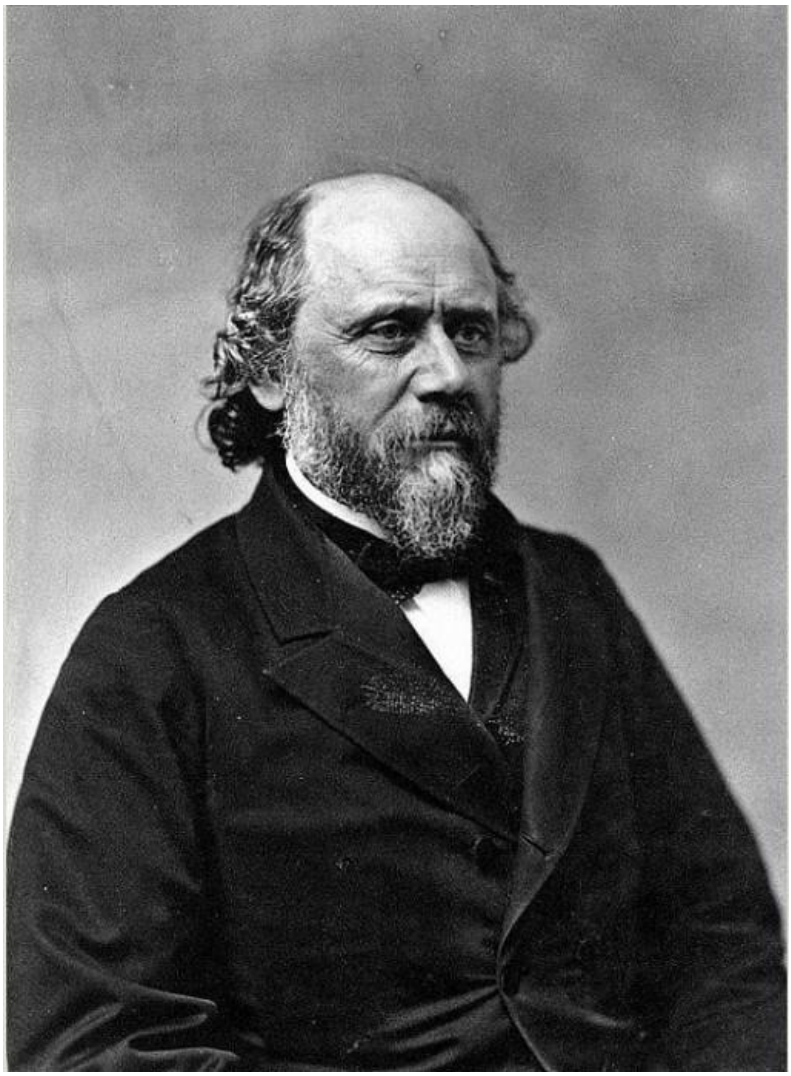

Illustration # 14: Richard Henry Dana, Jr. 1868

As a practical matter, Dana pointed out "that these indictments are to be tried in what was for five years enemy's territory, which is not yet restored to the exercise of all its political functions, and where the fires are not extinct. We know that it only requires one dissentient juror to defeat the Government and give Jefferson Davis and his favorers a triumph. Now, is not such a result one which we must include in our calculation of

possibilities?" Richmond, the capitol of the Confederacy, was a very unfavorable venue for the case. Even if no rebel sympathizer ended up on the jury, Dana feared that "a fear of personal violence or social ostracism may be enough to induce one man to withhold his assent from the verdict especially as he need not come forward personally, nor give a reason, even in the jury-room."[72]

What of the potential legal pitfalls? Underwood would certainly instruct the jury "that the late attempt to establish and sustain by war an independent empire within the United States was treason." What troubled Dana was that "the only question of fact submitted to the jury will be, whether Jefferson Davis took any part in the war. As it is one of the great facts of history that he was its head, civil and military, why should we desire to make a question of it and refer its decision to a jury, with power to find in the negative or affirmative, or to disagree? It is not an appropriate question for the decision of a jury; certainly it is not a fact which a Government should, without great cause, give a jury a chance to ignore." If the trial resulted in a hung jury, or worse, in an acquittal, the "result would be most humiliating to the Government and people of this country, and none the less so from the fact that it would be absurd. The Government would be stopped in its judicial course because it could neither assume nor judicially determine that Jefferson Davis took part in the late civil war. Such a result would also bring into doubt the adequacy of our penal system to deal with such cases as this."[73]

[72] Ibid.
[73] Ibid.

Dana might have urged a trial "if it were important to secure a verdict as a means of punishing the defendant." But he knew that the passage of time had worked against the prosecution. Davis had now been out on bond for over a year. He had committed no crimes. He had attempted no rebellion. Dana argued that "it would be beneath the dignity of the Government, and of the issue, to inflict upon him a minor punishment; and, as to a sentence of death, I am sure that, after this lapse of time and after all that has occurred in the interval, the people of the United States would not desire to see it enforced."[74]

What, after all, was now the point of the trial? Dana concluded with a warning that "the risks of such absurd and discreditable issues of a great state trial, are assumed for the sake of a verdict which, if obtained, will settle nothing in law or national practice not now settled, and nothing in fact not now history, while no judgment rendered thereon do we think will be ever executed. Besides these reasons, and perhaps because of them, I think that the public interest in the trial has ceased among the most earnest and loyal citizens."[75]

Dana was willing to try the case and believed that, if undertaken, a victory for the federal government was critical. Despite his reservations, he told Evarts that "I am confident that I can do my duty as counsel to the utmost of my ability and with all zeal. For my doubts are not what the verdict ought to be. On the contrary, I should feel all the more strongly, if the trial is begun the importance of a victory to the Government, and the

[74] Ibid.
[75] Ibid.

necessity of putting forth all powers and using all lawful means to secure it. Still, I feel it my duty to say that if the President should judge otherwise, my position in the case is at his disposal."[76]

If unexpected, the contents of the letter was a bombshell. But, Evarts clearly had spoken to Dana in the past about his own concerns over trying Davis. Now that he was Attorney General, he had the authority over the case. What he had to do, however, was convince Johnson that the case should not be tried. He pocketed Dana's letter for six weeks.

Despite the defense remaining unaware, the prosecution was quickly losing steam. On October 9, 1868, Attorney General Evarts wrote to President Johnson about the case. He enclosed a copy of the letter from Dana. He did not explain why it had taken him six weeks to get a copy to the president, but he stated that Dana had stated "views, in a careful and deliberate form, as to the propriety of the Government's remitting further prosecution of the pending indictment." Evarts confessed that his view of the case was in line with Dana's letter, and that "had I remained in a private professional relation to the case and to the Government, his communication probably would have borne my signature also."[77]

At the end of October 1868, Gideon Welles noted in his diary that Evarts had gone back to New York to vote and "to attend to his immense private business."[78] Evarts

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[76] Ibid.
[77] William M. Evarts to Andrew Johnson, October 9, 1868, *Andrew Johnson Papers,* Library of Congress.
[78] Welles, *Diary,* 3:463.

had only been to one cabinet meeting in the last five weeks and Welles complained that "important opinions are consequently postponed and action delayed."[79] The Attorney General addressed the entire cabinet on November 6, 1868, and informed them that "he did not think, and had not for the last two years thought any good end was to be attained by trying him - that if tried there was no likelihood whatever, and if convicted he would not be, and at this day ought not to be punished." He claimed that the trial was but a moot trial and that he never supported trials of that character. Since the Supreme Court would begin its term in the first week of December, Chase could not be present for the Davis trial, Evarts told the cabinet. Neither he nor his co-counsel, Richard Henry Dana, Jr., were willing to proceed with the case before Judge Underwood alone.[80]

Looking at the case as a whole, Evarts told President Johnson and the cabinet, the time had come for a dismissal of the indictment. The Attorney General advised the president to issue a final proclamation of amnesty and pardon without delay. The proclamation that Evarts proposed should encompass all cases that had not been addressed through previous amnesty proclamations. He urged Johnson to 'close-out' once and forever, the rebellion. After the president issued such a proclamation, Evarts would be free to dismiss the case against Davis. The suggestion by Evarts was not well received by everyone in the cabinet. Gideon Welles and William Seward, the last remaining hold-overs from the Lincoln Administration, opposed this idea. However,

[79] Ibid.
[80] Browning, *Diary*, 2:225.

Johnson expressed his support and asked Evarts to prepare a proclamation for consideration during the next cabinet meeting.[81]

When November began, with the charges still pending against Davis, overtures were made to President Johnson through an "intimate friend of the President" about obtaining a pardon for Davis. Johnson replied without equivocation that "he would let the law take its course" and that "there was nothing in his power except a pardon, and that he would never grant one."[82] Clearly, Johnson was not prepared to reveal to the supporters of Davis that he was considering a general amnesty. The case was again set late in the month of November 1868. This was not a trial setting and Davis would not be required to be present. However, he was not even to be found in Canada. Davis was touring England in November 1868, offering opinions about the holy city of Jerusalem and the unique fitness that Englishmen had for the task of exploring the city.[83] Being tried for treason did not seem to be one of his immediate concerns.

In the interim, O'Conor wrote to his co-counsel, Robert Ould, informing him that the case would be tried. O'Conor now wanted the defense team to shift tactics. If the defense had once attempted to get along with the prosecutors in the hope that the government might be persuaded to dismiss the case, O'Conor no longer felt bound to pursue that tack. He told Ould that the defense needed to take a hard-nosed approach to the case even to the point of embarrassing the prosecution, if possible. Further, O'Conor

[81] Ibid. 2:225-226.
[82] Charles O'Conor to Jefferson Davis, January 6, 1869, *Jefferson Davis Papers,* Museum of the Confederacy.
[83] *Boston Daily Advertiser,* November 28, 1868.

had information that Chief Justice Chase might be "inclined to consider the disfranchisement of the leaders by the late amendment of the Constitution as a punishment which precluded the infliction of any other penalty for the same offence, i.e. engaging in 'the rebellion.'" Ould took the information and was able to confirm that Chase did indeed consider this to be a correct interpretation of the new amendment. O'Conor told Ould to press the position. No other member of the defense team was even aware of the argument that was to be made and Davis himself was not informed.[84]

Just two weeks before the Davis treason trial was scheduled to begin in Richmond, Virginia, the two opposing lawyers met at a bar function in New York City. William M. Evarts, now the United States Attorney General, entered the banquet room of the Astor House in New York City alongside his opposing counsel in the Davis case, Charles O'Conor, to thunderous applause from nearly two hundred and fifty members of the New York Bar. O'Conor, as President of the Bar, escorted Evarts to the banquet table of the patriotically decorated room. O'Conor sat at the center of the table with the new Attorney General to his right and Lt. General Ulysses S. Grant, just having won the presidency, to his left. Also joining them at the table were Admiral David Farragut, the Governor of New York, the Mayor of New York City and Richard H. Dana, Jr. In attendance were all of the most distinguished lawyers and jurists of the state, who stood until O'Conor and his guests were seated. At the close of the dinner, toasts were proposed for the President-elect which was met with prolonged applause. Charles

[84] Charles O'Conor to Jefferson Davis, December 7, 1868, *Jefferson Davis Papers,* Museum of the Confederacy.

O'Conor then rose from his seat and offered a toast to "our guest," William M. Evarts. When Evarts rose to reply, he was met with three cheers from the guests. Grant left at eleven o'clock in the evening, but the banquet continued into the late hours of the night.[85]

Three days later, on November 20, 1868, Evarts attended a cabinet meeting in Washington. A proclamation granting a general amnesty and pardon for ex-rebels had been under consideration for some time. Evarts told the President that if an amnesty was not to be issued, then he needed to immediately instruct prosecutors in the Davis case to postpone the trial, which was set for the following Monday. Johnson admitted that he continued to grapple with the question of whether to issue such a proclamation and had not decided to do so. A reading of this entry in Browning's diary makes it appear very improbable that the government ever intended to try Davis in November. Davis was out of the country and William Evarts was waiting for a decision to be made on the amnesty proclamation, which depending on its scope, might pardon Davis himself. However, it is also clear, given that Davis was not present, that the government did not expect the Davis defense team to go on the offensive come the court date.[86]

On Monday, November 30th, the United States Circuit Court convened in Richmond with both Salmon Chase and John Underwood sitting as judges. Once again, Chief Justice Chase announced that he would not be able to preside over a trial, citing the upcoming Supreme Court term. And, once again, the United States government

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[85] *Frank Leslie's Illustrated Newspaper,* December 5, 1868. Grant gave a conditional acceptance of the invitation, telling the sponsors that he would not attend if any of the cabinet members attended. See Browning, *Diary,* 2:226-227; and Welles, *Diary,* 3:467.

[86] Browning, *Diary,* 2:227.

requested a continuance so that the case could be tried before him in the coming year. For the first time in months, the defense team showed a shift in their tactics by indicating that they had other matters to press. Robert Ould urged a motion to quash the indictment against Davis on the grounds that the recent passage of the Fourteenth Amendment to the Constitution, ratified on July 9, 1868, operated as a bar to further prosecution of any person who engaged in insurrection or rebellion against the United States. Ould submitted an affidavit swearing that Davis served as a Representative from Mississippi in 1845 and had taken an oath to support the constitution of the United States on December 8, 1845.

Section 3 denied civil or military office to former Confederates. Ould argued that these disqualifications were the constitutional punishment for engaging in the rebellion and that no other sanction, even for the constitutional crime of treason, could be added for participation in the civil war. The argument was bolstered by the fact that the Amendment did specifically impose unique sanctions on the rebels. Ould's argument boot-strapped into a double jeopardy argument by claiming that the civil sanctions imposed by the Amendment constituted a criminal punishment that prohibited further prosecution against Davis because a treason trial exposed the ex-rebel to a second punishment. The prosecution was caught flat-footed by Ould's assertions and asked the Court to postpone a decision on the issue until they were able to fully prepare a rebuttal. Prosecutors suggested that a hearing on the motion to quash be delayed until after the end of the Supreme Court session. Defense attorneys challenged such a long delay and asked that it be heard as soon as possible. Chief Justice Chase, perhaps sensing the opportunity

through this novel legal position to rid himself of having to preside over the trial, postponed the argument three days.[87]

By this point, the nation's newspapers were openly questioning whether the case should be dropped by the prosecution. The *New York Evening Post* reported that William Evarts stated that the case would have been tried in the previous year but for the impeachment proceedings against Johnson.[88] If Evarts did say that, his remark flew in the face of the obstacles that he knew existed to trying the case, even a year earlier. Referring to the prosecution as a "farce," the *Springfield Republican* asked its readers how long the prosecution would be maintained. Asserting that very few people cared whether he was tried and that no one expected him to be, the editors argued that he should "be at once relieved of all legal liabilities and allowed to sink into merited obscurity."[89] A newspaper in Connecticut, the *New London Democrat,* sarcastically noted that "the distinguished criminal has gone abroad and occupies his leisure moments in lecturing about Jerusalem."[90] It was becoming much more difficult to maintain the posture that the case had any momentum that would lead it to be tried.

Lawyers for both sides arrived in court on December 3, 1868, prepared to argue the defense motion to quash the indictment against Davis. The biggest name, and most important lawyer for the government, Attorney General William M. Evarts, did not attend, reportedly because of other, more pressing, engagements. Robert Ould took the

[87] *Baltimore Sun,* December 3, 1868.
[88] *New York Evening Post,* November 28, 1868.
[89] *Springfield Republican,* November 28, 1868.
[90] *New London Democrat,* December 5, 1868.

lead on behalf of Davis. The arguments that he made simply elaborated upon those that he had broached with the Court the previous Monday. Boiling the argument down to its essence, he asserted that the passage of the Fourteenth Amendment imposed punishment upon those who engaged in the rebellion and barred the government from seeking further sanctions against Davis, including criminal sanctions for the crime of treason. Richard Henry Dana, Jr. rose to address the Court on behalf of the government, remarking, once again, that the argument had been unexpected to both the prosecutors and the Court. Chase responded that it was not unexpected to the Court since the defense had set out the basis of the motion to quash on Monday. O'Conor, playing both to the Court and the audience, offered that the defense would not oppose any amount of time for the prosecution to prepare their response so long as Chief Justice Chase was able to hear the argument.

Given the government's position that it was unprepared to respond, Chase took a recess until afternoon to hear the government's response. When the Court reconvened, H. H. Wells, the military governor of Virginia, and S. Ferguson Beach, the new United States Attorney for the Eastern District of Virginia, took the lead on arguing the motion. Beach argued first. He remarked, correctly, that the defense motion rested upon the proposition that the effect of the constitutional amendment was to repeal the treason acts of 1790 and 1862 under which the indictment of Davis was framed by asserting that the punishment for treason had been changed by the amendment. The Fourteenth Amendment, he told the Court, operated only to disenfranchise former rebels, it did not punish them for crimes. This was a collateral and incidental disability that was attached

to the commission of the offense, but not a change of punishment. There was nothing in the language of the Amendment that would indicate that it was intended to act as a bar against a treason prosecution. Governor Wells then offered his take on the defense motion. The intent of the passage of the Fourteenth Amendment was not to change the criminal code of the United States; instead, it was to protect places of public trust from those who have previously violated the public trust by engaging in the rebellion. He acknowledged that one statute may repeal another, under the rules of statutory construction that may be done if the two statutes were so incompatible as to be mutually exclusive.[91]

Wells finished his argument at three in the afternoon. His co-counsel, Dana, rose and told the Court that he requested that his argument be postponed, overnight, for him to prepare. He also asked the Court to be allowed to close the arguments, intending to force O'Conor to speak first so that he might answer any issue raised by the New York defense attorney. This was requesting that the traditional sequence of argument be taken out of order, since ordinarily it is the party with the burden of proof, in this case the defense because it was their motion to quash, that retains the right to close arguments.

At ten o'clock the next morning, Chief Justice Chase drew the court to order. The United States Courthouse, which sat just down the hill from the Virginia State Capitol, was packed with spectators anxious to hear Davis' attorney, Charles O'Conor, and the government's attorney, Richard Henry Dana, Jr. argue the motion to quash. There was no spare seat to be found in the courtroom itself. Chase looked and bore the deep dignity

[91] *Richmond Whig*, December 4, 1868, and *Boston Post*, December 7, 1868.

of a man in a high place. He asked the defense whether there was anything further that needed to be added before the prosecution responded to the motion. Two lawyers had already argued the motion the day before. James Lyons was scheduled to be the third. He responded to the Court by saying that he had decided not to argue the motion in the hope that the two defense arguments would prove sufficient and that the decision might be expedited by his decision not to take any more of the Court's time.

Richard Henry Dana, Jr. spoke on behalf of the government in a hearing covered closely by the nation's press. He acknowledged the momentous decision that the two judges would shortly render. "The Fourteenth Amendment," he argued, "is not a provision of criminal law, looking to the punishment of individuals by depriving them of office, but is an organic measure, having for its object the securing of trustworthy persons for administration. It has, therefore, no effect to repeal the laws against treason, on which this indictment rests."[92] The Amendment "was a measure of precaution to secure the country against filling offices with persons who had once before filled them and broken their oaths." Dana urged the Court to see the Amendment for what it was: "an expression only of the public will as to the fitness of those who engaged in the rebellion after breaking their oaths to hold office again." He closed with the observation that viewed from the defense perspective the Fourteenth Amendment would actually encourage rebellion since it would bar participants from any penalty except disfranchisement.[93] Characterizing the defense position as "absurd," Dana asserted that it was indeed the

[92] *Richmond Whig*, December 4, 1868, and December 8, 1868.
[93] *Boston Post*, Boston, December 7, 1868.

position of the case now before the Court, with the defense admitting "that the defendant did commit treason, and, admitting that he held office and took the oath" of allegiance to the United States, but cloaking Davis with the Fourteenth Amendment and claiming that the newly ratified constitutional amendment exempted him from punishment. The powerful argument by Dana confidently maintained that there existed no evidence that Congress intended this interpretation of the amendment nor that the people, by accepting it, envisioned the defense position.[94]

It is apparent from the reaction of the counsel for the prosecution that they were surprised by the novel defense argument, first raised on Monday, about the legal effect of the Fourteenth Amendment on Davis' treason prosecution. By Thursday, however, this surprise should have been overcome. Why would the United States Attorney have asked the Court, on Thursday, for more time to consider the motion to quash? Clearly, Richard Dana, Jr. was prepared to respond to the defense motion, which he mocked and treated as specious. Of course, the Fourteenth Amendment did not mean to bar the criminal prosecution of traitors. Either Dana should have responded to the motion at the opening of the Court on Thursday morning, or he should have prepared his co-counsel to respond as he did after lunch so that the defense motion could be turned aside immediately at the opening of the day. By its hesitancy to address the motion directly and forcefully, the government permitted the defense motion to appear to have some merit. As Charles O'Conor rose to address the Court, it was yet unknown whether either Chase or Underwood would see the motion as meritorious.

[94] *Richmond Whig*, December 8, 1868.

O'Conor took an interesting tact in his argument by addressing Chief Justice Chase almost to the exclusion of Judge Underwood. He began his presentation by subtly reminding the court that this was a case of great importance. Almost immediately, he remarked that the Chief Justice was now linked to the great John Marshall, who had famously tried the Aaron Burr treason case in Richmond at the beginning of the century, and had first interpreted the constitutional provision on treason. Without directly stating the proposition, O'Conor then attempted to broaden the question to include not only Jefferson Davis, but the entire Southern people. In O'Conor's view, the great Chief Justice had, by his rulings in the Burr trial, done much "to give practical explanations and interpretations of those provisions of the Constitution which provide for the punishment of citizens for alleged treason, and to decide whether cases of this nature are to be proceeded with farther to vex and annoy and inspire with terror a whole people." Now, O'Conor stated, Chase possessed the ability to interpret this new amendment. The only question was whether Chase would "be found ready to do as much to comfort the people as his illustrious predecessor had been in his day."[95] O'Conor urged Chase to view this prosecution in the context of the greater political question facing the nation. Without directly stating it, the question that O'Conor wanted Chase to answer was, would the prosecution of Davis serve the nation well?

[95] *Richmond Whig*, December 8, 1868.

O'Conor then read the Court Section 3 of the Amendment.[96] He argued that the Amendment was self-enforcing and needed no judicial interpretation, which was his way of arguing that the only way to interpret the section was to find that it provided for the only punishment to be inflicted upon people who engaged in the rebellion. There was no need for the Court to look at the intent of the framers of the Amendment; "we find upon its face that the framers contemplated its operation on the individual, and looked upon it as the infliction of a punishment." Now, O'Conor engaged in a sleight of hand. "It is a familiar fact, that the terms disability and penalty indicate punishment for crime."[97] The problem with O'Conor's argument was that Section 3 does not contain the word "penalty," it only uses the word "disability." But O'Conor wanted the Court to conflate the words disability and penalty.

O'Conor never claimed that the framers of the Amendment sought to limit the punishment of rebel leaders. Instead, he phrased his argument differently. "If the framer of this section, instead of being willing to have them hung to satisfy the vengeance of those who demanded blood, intended by it to bind up the wounds of the nation, to let the past be the dead past, he is not a traitor, but a statesman, a patriot and a benefactor of his

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[96] Section 3 reads, as follows: "No person shall be a Senator or Representative in Congress, or elector of President or Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability."

[97] *Richmond Whig*, December 8, 1868.

race and country."[98] The nuances of this argument were brilliant, yet a judge should have been able to see through the legal weaknesses of O'Conor's presentation. The Amendment would only help the Davis defense if it barred the treason prosecution. Whether or not it reflected the legislature's desire to reconcile the two sections of the nation had no bearing on the ability of the government to proceed with the treason trial.

O'Conor then shifted his argument once again. Southern leaders, he stated, were also punished by social stigma, referring to them as "pariahs in the land of their birth."[99] He ignored the fact that rebel leaders were considered heroes in the South. Whatever social stigma they suffered was limited to that which they may face in the North, and then only amongst those persons who considered their actions dishonorable. He also took no notice that social stigma often accompanies criminal acts but has rarely been viewed as a substitute for the penal sanctions provided by law. The New York lawyer did not want the Court to view this case as only involving Davis, despite the fact that the statute of limitations had run on the crime of treason at the time of his argument in December 1868, and the accompanying fact that many of the leaders of the rebellion had be pardoned for their actions during the war.

O'Conor reasoned that the punishment of the removal of civil rights was adequate for the "object in view," i.e. that of chastising the former leaders of the South. "The bravest of those who led the Southern armies to battle are now disqualified from holding any office whatever," and moreover, "in point of civil rights, [are] below the humblest of

[98] Ibid.
[99] Ibid.

their former slaves."[100] He made no mention of whether this was adequate as punishment for the crime of treason. The Amendment inflicted a new punishment, according to O'Conor, that was substituted for that to which they were liable under the existing law at the time of their actions. By this time, the arguments had been going for five and a half hours. Chase ordered a 45 minute break.

When the defense continued after the break, O'Conor raised a new question. How could fair trials for treason be had after a war so great as the one just ended, he asked? The only answer, of course, was that fair trials could not be held in such an atmosphere as existed in the country in the latter part of the 1860s. He found it repugnant to humanity that the Confederate leaders would be treated as equals by their Union counterparts during the war, but then put on trial for their lives after the war. Surely, he argued, this was not what either the Government or the people intended to be done. This, he maintained, was why the Fourteenth Amendment was adopted. Acknowledging that it was a great and beneficial act of mercy by the American people, he nonetheless asked Chase and Underwood to give the Amendment the expression that he claimed it was meant to bear. Universal suffrage, something that he would never have accepted, "should be accompanied, hand in hand, with universal amnesty of supposed offenses arising out of the unfortunate controversy, in which universal suffrage may be said to have had its origin and establishment."[101] His arguments now drifted even further from the facts. What if the war had lasted several generations? Would the great grandson of Davis have

[100] Ibid.

[101] *Boston Post,* December 7, 1868.

faced a treason charge? O'Conor's argument now bore little relevance to the motion to quash, but he was not arguing a criminal motion, he was arguing for a radical change in national policy. The Fourteenth Amendment did not act as a guard against the further political rule by the men who pushed the Union into war; it was an amendment designed to minimize the consequences to those men for their actions in bringing the war. He then made his most stunning assertions:

> I conclude, as a general proposition, that indictments for treason or other prosecutions for belligerent acts in the due and orderly prosecution of a civil war on the rebel side, are not properly the subjects of criminal prosecutions or civil action. It might not be easy to satisfy a reasonable mind that this was the case, unless there was some other mode of punishing the delinquency of those who offended against the right in maintaining a rebellion against rightful authority, but there is an adequate remedy. The war which displaces the municipal law furnishes its own remedy. The defeat and overthrow of the rebels in open war carries with it a multitude of terrible inflictions upon them which might satisfy an ordinary thirst for vengeance if by maintaining their supposed rights in a manner inconsistent with humanity, the rebels merit severer punishment than this, it might be inflicted by refusing quarter, it might be inflicted by decimating those in the ranks and executing, in some military form, the leaders. There is no law capable of being enforced which enjoins upon the victor in war the duty of giving quarter in war to his vanquished adversary. It is only his responsibility to the common opinion of mankind and his unwillingness to outrage that opinion that in the absence of compassionate feelings on his own part compels him to abstain from such extreme. If the vanquished had demeaned themselves in a manner so criminal as to justify such extreme severity, extreme severity may be safely employed. If they have not so conducted themselves, it ought not to be employed.
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> It will be seen, therefore, that there is no occasion, at the close of a civil war, for resorting to the aid of the civil magistrate, through an indictment and trial by jury, to punish traitors for warring against the Government. The only motive that could induce the victorious General to turn his vanquished adversary over to the civil law and seek his destruction by the verdict of a jury condemning for treason, is his unwillingness to brave the common sentiment of mankind by condemning him, of his own authority, to a military execution. It is a very mean and

> unworthy office to assign to the judiciary, and it is to be regretted if, under any circumstances, the judiciary is not at liberty to refuse compliance.
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> In the cases of such civil war, a trial in the ordinary course of the law is entirely inappropriate to dealing with the case of the leaders. Their acts are so notorious and have been so open, that they do not form a legitimate subject of proof in a court of justice. They are actually known to the Government in all of its departments. They are actually and officially known to the court, and cannot be properly the subject of proof or disproof. To obtain an impartial jury is utterly impossible, for the jurors must all themselves have actual personal knowledge of all the facts which, upon an indictment and plea, would be formally put in issue. Gravely submitting, on testimony formally taken, to twelve jurors in the county of Henrico, the question whether an open and public war against the United States was here maintained and waged, and whether Jefferson Davis was the leader of it, would be a mockery and a farce.[102]

Caught up in his own impassioned argument, O'Conor then made the argument that defense lawyers, faced with a case involving overwhelming evidence of the guilt of their client, wish they could make with a straight face. The Sixth Amendment to the Constitution grants an accused the right to an impartial jury. How, he implied, with all of the evidence of Davis' guilt, could he get an impartial jury?

He asked the Court to "give peace and the vast assurances of peace to a vast section of this country." Not quite satisfied, O'Conor pointed out to the Court the "great and beneficent act of grace and mercy in the construction which *we have put upon it*, and which tends to advance that which all good men who are believers in universal suffrage so much admire - that universal suffrage should be accompanied, hand in hand, with a

[102] *Richmond Whig*, December 8, 1868.

universal amnesty of all supposed offenses arising out of the unfortunate controversy in which universal suffrage may be said to have had its origin and establishment."[103]

A Divided Trial Court

Chase adjourned the Court until the next day but the prosecutors and defense attorneys were recalled by him to the courtroom that evening. Once all were assembled, Chase announced that he and Judge Underwood had considered the motion to quash and disagreed on what constituted the proper ruling. Chase told the lawyers that he was in favor of granting the motion to quash, while Underwood thought it should be denied. Because there was a split on the issue, Chase stated that the question would be certified to the United States Supreme Court for review and decision. Then, having dropped this bombshell, Chase decided to leave Richmond for Washington the next day.[104]

Davis' defense team advanced an argument that they conceded requested that the Court construe the Fourteenth Amendment as they would ask for it to be construed instead of with the construction that they could show was intended by the framers or that the plain language of the Amendment mandated. O'Conor went further and urged the Court to ignore the law and find that a treason indictment was not in the best interest of the nation after the war. His argument asked that the Court legislate an outcome on a question that was clearly outside the province of the judiciary. He clearly was appealing

[103] Ibid.
[104] *Daily Eastern Argus,* December 5, 1868.

to Chief Justice Salmon Chase. The question is why the defense team thought that Chase might be open to such an argument. The answer is stunning - Robert Ould had been tipped off that Chase "was inclined to consider the disfranchisement of the leaders by the late amendment of the Constitution as a punishment which precluded the infliction of any other penalty for the same offence, i.e. engaging in '*the rebellion.'* Acting on this information, O'Conor was "determined at once to give him a chance of making a judicial determination accordingly."[105] The news that Chase would be open to this argument arrived so near the court date that O'Conor did not have time to even apprise his client of the position that he would be taking. Apparently, Ould and O'Conor had a single conversation about the Chief Justice's inclination before they put it forward.

O'Conor, however, relied upon more than just this tip. After the argument, he conversed with the Chief Justice and was able to report to Davis that "the Chief Justice is thoroughly enlisted. His judgment is with you; his fancy is excited; he says a judicial determination of this point in your favor would furnish a magnificent chapter in our history and sundry things of that sort."[106] As a judge, Chase should not have told O'Conor that his judgment was with Davis. Indeed, it was unethical for him to do so. Certainly, O'Conor knew after the decision was announced that Chase had voted to quash the indictment. The question was certified to the United States Supreme Court. Since it still needed to be litigated before the Supreme Court and because Chase was the presiding judge of that court, he should not have reassured O'Conor that he was in Davis' corner.

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[105] Charles O'Conor to Jefferson Davis, December 7, 1868, *Jefferson Davis Papers*, Museum of the Confederacy.
[106] Ibid.

Why, then, would Chase tell O'Conor this? Likely, he did because it served his political ambitions to let O'Conor know his feelings. According to O'Conor, Chase even mentioned to O'Conor his concern that the defense lawyer had conceded a disputable point. O'Conor wrote to Davis that Chase "twice returned to this topic," making clear that the Chief Justice was attempting to help O'Conor hone the argument that he might make before the Supreme Court. It must be understood that appellate judges argue with their colleagues about the outcome of cases pending in their courts. By Chase admonishing O'Conor not to concede a disputable point, it makes it that much easier for Chase to prevail in chambers on the point. If Chase wanted to argue that a point was indisputable, all that another Supreme Court Justice would have to do would be to point out that even the counsel for the party itself conceded that the point was disputable. The excitement that O'Conor felt by hearing Chase give him pointers on honing his argument is palpable in his letter to Davis. Chase was on Davis' side and had told them so. The defense lawyer, in his exhilaration wrote Davis that "I mention these things to shew you the state of his mind."[107]

Even in his delight, though, O'Conor betrayed a suspicion of Chase's purpose, by telling Davis that "what may be the real objects of this practised politician I know not. Various motives may be imputed to him. Only one of them involves any thing unpleasant."[108] Apparently the lack of ethics was not considered unpleasant by O'Conor; however, his suspicion that Chase, ever the abolitionist in the minds of the Democrats,

[107] Ibid.
[108] Ibid.

might have thought that the Fourteenth Amendment had not been legally ratified, and was looking for an opportunity for the Supreme Court to render a decision to affirm its legality, concerned the New York lawyer. No matter how pliable Chase was in an effort to advance his political ambitions, even the recipients of his favors distrusted his motives.

Another question, whether O'Conor intentionally addressed his argument to Chief Justice Chase almost to the exclusion of Judge Underwood, became clear when he told Davis that Underwood's opposition to granting the motion to quash constituted only a "formal impediment."[109] His vote was not the one that mattered.

On Monday, December 7, 1868, Congress assembled in Washington, D.C. Two days later, Johnson's message was read to the combined houses. Tracing Reconstruction from December 1865 when Johnson claimed that "civil strife had ceased, the spirit of rebellion had spent its entire force, in the Southern States the people had warmed to national life,"[110] the president claimed that congressional legislation had left the country in agitation and strife. Johnson called for the repeal of much of the Radical's enacted agenda, and a shrinking of the federal government. He made no mention, however, of the pending case against Davis, despite it occupying center stage only days before. Nor did he mention any intention on his part of issuing an amnesty proclamation.[111] Having permitted the message to be read, members then "denounced it as infamous, abominable,

[109] Ibid.

[110] Andrew Johnson, Fourth Annual Message, December 8, 1868, *Papers of Andrew Johnson*, 15:283.

[111] Ibid. 15:281-304.

wicked."[112] The enmity between the legislative and executive branches of government would continue through the end of Johnson's administration.

Friday, January 8, 1869, found all members of the Johnson cabinet in attendance. William Evarts gave a copy of instructions that he had sent to all government prosecutors. In it, he directed that United States District Attorneys file a *nolle prosequi*, a formal entry by the prosecutor giving notice that prosecution in the case will cease, in all pending treason indictments arising out of the rebellion. The diary of Secretary of the Interior Orville Browning, which references Evarts telling the entire cabinet of his decision, does not indicate that the decision warranted any discussion.[113]

The following evening, Evarts dined with all of the justices of the Supreme Court except the frail Associate Justice Robert Cooper Grier. Whether he told them of his decision to end the treason prosecution against Davis is not recorded, but the appeal from the divided trial court was pending before the Court. The government's efforts to punish rebels was quickly winding down. Two days after this dinner, Evarts presented the full cabinet with his plan to end all pending confiscation cases. Only William Seward and Hugh McCulloch even hesitated to accept his proposal. After only a short discussion, the president and his cabinet voiced unanimous support for the move.[114] The Davis treason charge would be dismissed and the confiscation suits against the former rebels would be ended.

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[112] Welles, *Diary,* 3:479.

[113] Browning, *Diary*, 2:234 and *Black's Law Dictionary*, 5th Ed., (St. Paul: West Publishing Company, 1978), 945.

[114] Browning, *Diary*, 2:234-235.

Despite the decision being reached, it was not until Thursday, February 11, 1869 that the United States District Attorney entered a *nolle prosequi* in the treason prosecution against Davis. Both indictments were dismissed. Almost as an afterthought, since no action had ever been taken on the other treason indictments found in 1865, longstanding but unprosecuted indictments against Robert E. Lee, Wade Hampton, Henry Wise, William Mahone, Jubal Early and nearly thirty others were dismissed. Robert Ould, attorney for Davis, moved that the Court order that the men acting as sureties on Davis's bond be discharged from further obligation to the bond.[115] Ironically, one of the *nolle prosequi* entered on that day was in relation to the treason indictment against Jefferson Davis's attorney, Robert Ould.[116]

The end of the prosecution did not generate headlines, but was instead buried far from the front page. Northern papers treated it with disdain. The *Elkhart Weekly Review* of Indiana noted the dismissal in the case of "Davis and other traitors,"[117] while the *Portsmouth Journal of Literature and Politics* by-lined the news as simply "the farce ends."[118] Davis was not present in the Richmond courtroom. He was touring Paris.[119]

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[115] *Cincinnati Daily Gazette*, February 12, 1869.
[116] *Alexandria Gazette*, February 12, 1869.
[117] *Elkhart Weekly Review*, February 18, 1869.
[118] *Portsmouth Journal of Literature and Politics*, February 20, 1869.
[119] *Richmond Whig*, February 9, 1869.

To be pardoned for a great crime, as for instance treason or piracy, is the next thing to being punished for it. - Gerrit Smith

Conclusion

Granting Life and Liberty to Traitors

On May 9, 1865, Gideon Welles confided to his diary that "the President in the exercise of the pardoning power may limit or make condition, and, while granting life and liberty to traitors, deny them the right of holding office or voting."[1] Little did he know, about a month after Lee's surrender, how prescient his entry would later sound. Five years after the war ended no Confederate had been hanged for treason. The only rebel seriously prosecuted had escaped with his life and liberty. All that was left to be determined was whether the narrative of the case could be re-written. Jefferson Davis was intent on doing just that. In the decades following the war, a fierce battle was fought over the memory of men like Davis and Lee. While Lee did little to publicly attempt to shape history, Jefferson and Varina Davis took an active role in it, at once portraying the ex-Confederate president as a martyr and hero of the Confederacy.

In mid-January 1876, Davis wrote from New Orleans to the James Proctor Knott, the Democratic Chairman of the Committee on Amnesty for the United States House of Representatives. Congress was taking up the thorny question of amnesty for those few remaining rebels who had not had their rights fully restored. Several members of congress were adamantly opposed to the inclusion of Davis. The ex-rebel president made

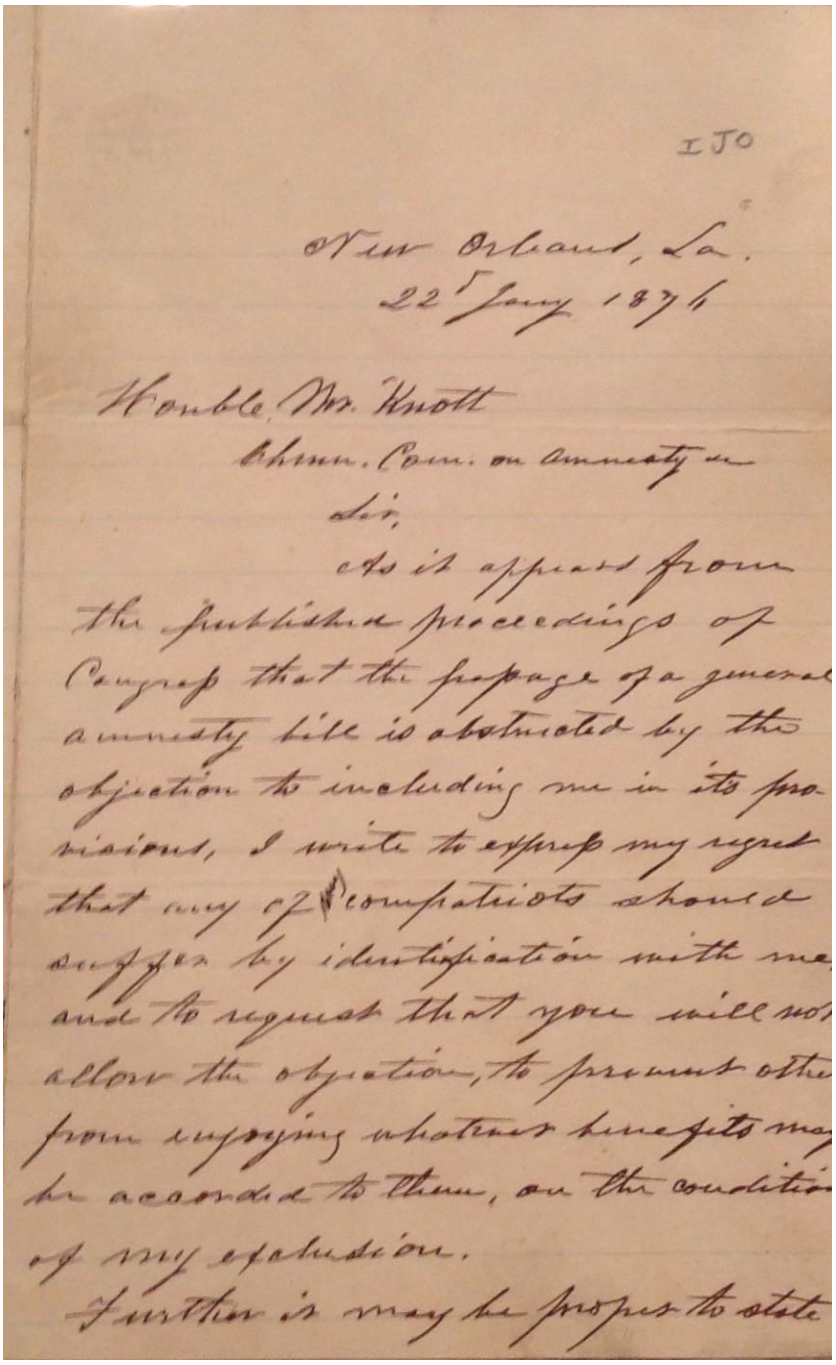
[1] Welles, *Diary*, 2:301-304.

his unrepentant views clear to the congressman. He did not seek amnesty and did not desire it. He had done nothing wrong and had done nothing that he regretted. He stated:

> As it appears from the published proceedings of Congress that the passage of a general amnesty bill is obstructed by the objection to including me in its provisions, I write to express my regret that any of my compatriots should suffer by identification with me, and to request that you will not allow the objection to prevent others from enjoying whatever benefits may be accorded to them, on the condition of my exclusion.
>
> Further it may be proper to state that I have no claim to pardon, not having in any wise repented, or changed the convictions on which my political course was founded, as well before, as during, and since the war between the States.[2]

His words mirrored his public position after the federal government failed to bring him to trial.

[2] Jefferson Davis to James Proctor Knott, January 22, 1876, in the possession of the author.



IJO

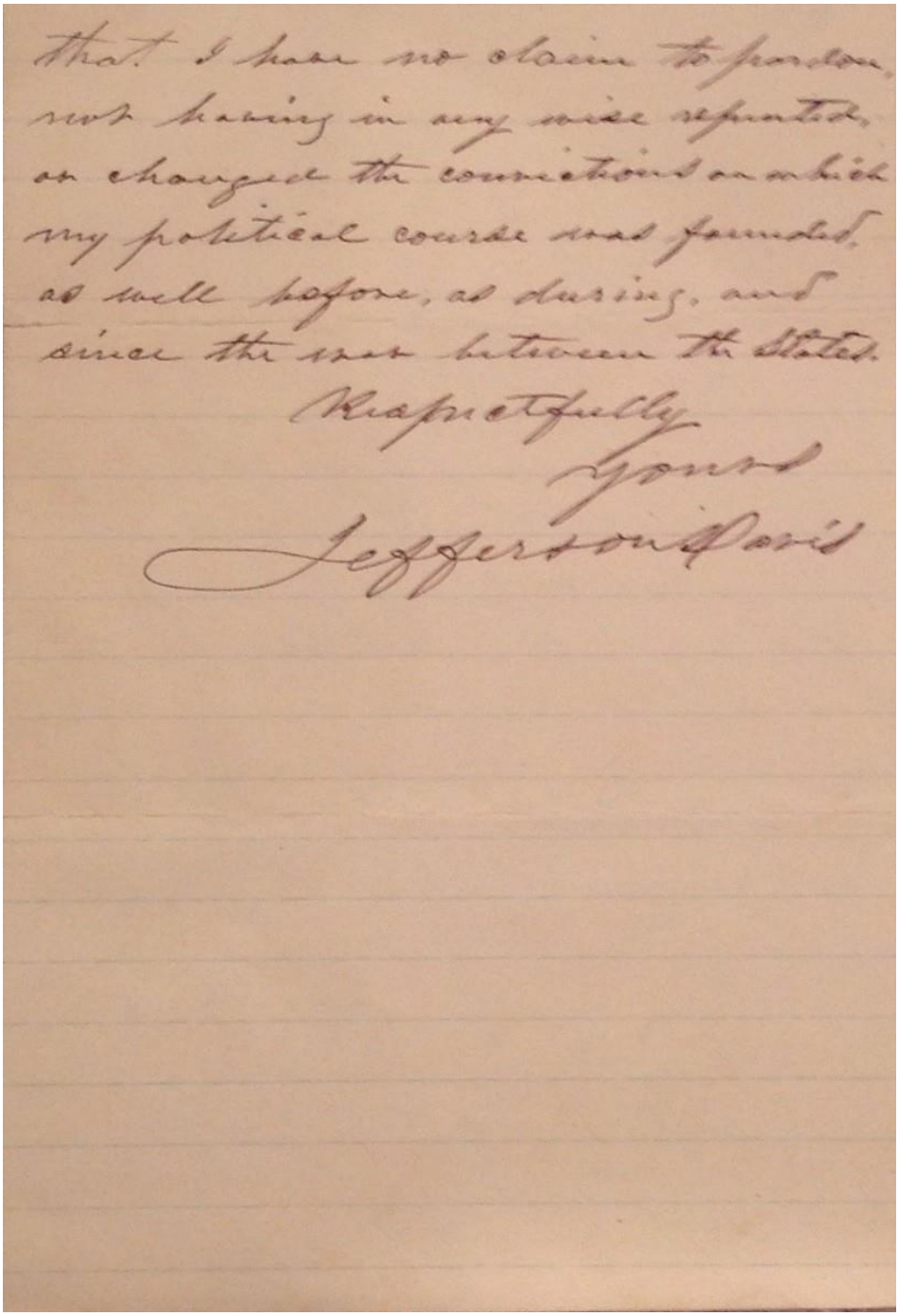
New Orleans, La.
22nd Jany 1874

Hon'ble Mr. Knott
Chmn. Com. on Amnesty &c
Sir,

As it appears from the published proceedings of Congress that the passage of a general amnesty bill is obstructed by the objection to including me in its provisions, I write to express my regret that any of my compatriots should suffer by identification with me, and to request that you will not allow the objection, to prevent others from enjoying whatever benefits may be accorded to them, on the condition of my exclusion.

Further it may be proper to state

Illustration # 15, continued on next page.


that I have no claim to pardon,
not having in any wise repented,
or changed the convictions on which
my political course was founded,
as well before, as during, and
since the war between the States.

Respectfully
Yours
Jefferson Davis

Davis letter to Representative James Knott

January 22, 1876

After the case was dropped, Davis carefully cultivated the image of a fearless man, wrongfully accused of a heinous crime, who had wanted nothing more than a public trial to prove the legality of secession and his own innocence. The image sat well with Southerners, already becoming deeply immersed in the myth of the Lost Cause. The truth is much different and much more human. While he was imprisoned, Davis proved to be a nervous, difficult client. His flight from Richmond, when many other rebel leaders were disregarding personal danger and submitting to federal authority, began the long road through the latter half of the decade of the 1860s that often times exposed the human fears and frailties of Davis. The humiliation of his capture, his transfer to solitary confinement, his lengthy imprisonment and isolation from his family, resulted in a very understandable deep depression and anxiety over his future. His wife, Varina, wrote letter after letter pleading for his release while citing the toll that the confinement took on him physically and mentally. Once released, but still under indictment, his lawyer fretted over whether Davis would even appear to answer the charges in Richmond.

Similarly, Davis maintained after the war that he would never apply for a pardon because he did not believe that he had violated any law. Settling comfortably into the role of martyr for the defeated Confederacy, Davis publicly hoped that others might be pardoned, but bristled at the suggestion that he should be considered for the same treatment. But while the treason charge was pending against him, the subject of pardon was broached with President Johnson through intermediaries, although it was met with stern disavowals by Johnson of any possibility of it being granted even as late as

November 1868. This did not slow the attempts by lawyers for Davis to secure a pardon for their client while he stood charged in the case.

The effort to re-write history by Davis stretched to the end of his life. Nearly a quarter century after the end of the war, he publicly defended his role in the Civil War in an article he authored and had published in *The North American Review*. He had, he stated, "no excuses to make and no apology to offer." Neither the loss of life nor the destruction of his beloved South chastened him. "Instead of being 'traitors,' we were loyal to our States; instead of being rebels against the Union, we were defenders of the Constitution as framed by its founders and as expounded by them."[3]

Those on the Union side viewed the failure to try Davis differently. Attorney General James Speed spoke to the Society of the Loyal Legion in Cincinnati, Ohio in late spring, 1887, about the character of Abraham Lincoln. He touched on the issue of the punishment of the rebels and how it was influenced by Lincoln, despite the president long being dead. "The nation imbibed his magnanimity. The spectacle of so vast a collision, with none brought to punishment, stands alone in history. Only that group of fiends who stilled the pulsations of Lincoln's great heart paid the penalty of crime."[4]

That group of Northern men and women looked at the Confederate leadership and saw unvarnished traitors. Davis walked free because of the high-mindedness and generosity of the spirit of the Union. They harbored no doubt that Davis deserved to hang for the treason he committed. But, in their eyes, the United States was imbued with

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[3] Jefferson Davis, "Lord Wolseley's Mistakes," *The North American Review*, 149:395 (Oct. 1889), 473.

[4] Speed, *James Speed*, 133.

an exceptionalism in many regards, not least of which was the penchant for mercy when societies in other nations would have sought revenge. Northerners were divided on the right path to take with regard to the question of treason after the war. Predictably, Democrats and Republicans had differences of opinion, but more telling was the split in Republican and former abolitionist ranks. Men like Horace Greeley and Gerrit Smith joined the chorus of voices decrying the treatment of Davis and arguing that he had not committed treason. They were so certain of this that they signed his bond to have him released from custody.

The failure to bring Davis to trial for treason did not arise from a Union concern that the results of battle would be overturned by the courts. By the blood drawn by the sword, secession had been rendered unconstitutional once and for all. The failure to bring him to trial did not proceed from a fear that he would be acquitted. Until the very end of the time that he faced indictment, Union officials were concerned about the possibility of an acquittal but not cowed by it. Andrew Johnson never wavered in his belief that Davis was guilty of treason and should be punished for it. However, he consistently placed his trust in the subordinates whom he believed to be experts in the field of law and deferred to their recommendations regarding every aspect of the prosecution.

A convergence of events, personalities, ambitions and skills operated to deny those who believed Davis should be brought to trial. Lucius Chandler bore the primary responsibility for the failure to bring Davis to bar. As the United States Attorney for Virginia it was initially his duty to bring the case against Davis. He lacked the

confidence and the skill to do so. Frustratingly slow in his decision making, he looked for reassurance that he should bring Davis to trial even after the Attorney General had authorized the indictment of the former rebel. Since he was not a trial lawyer, he did not understand how to draft a proper indictment or prepare a case for trial. And because he ran for Congress on several occasions, the question will always arise whether he slowed the progress of bringing Davis to trial because he believed that it would turn many Virginian voters against him politically.

Chandler never gained election to the House of Representatives, although he ran for the office on three occasions. Nor did his life end happily. In 1876, he was accused of misusing funds during, among other times, his tenure as United States Attorney. The allegation took a serious toll on his spirit, but he enlisted help to get his name cleared of the charge. Finally, at the beginning of April 1876, while in Washington, D.C., he was told that there was no evidence to support the accusation. Reportedly he appeared to be deeply comforted by the news. He returned to Norfolk immediately and the next day spent writing out a deed conveying property to one of his daughters. Early the next morning, he rose very early, dressed in a black suit, filled his pockets with rocks and drowned himself in the Elizabeth River. His body was not recovered for some days.[5]

The political ambition of Salmon Chase motivated him to have nothing to do with allowing Davis to be brought to trial. Immediately after the war, he found reason in the Union military occupation of Virginia to not hold court in the state, in spite of the civil

[5] *Critic-Record* (Washington, D.C.), April 10, 1876; *Evening Star*, April 17, 1876; and, *People's Advocate* (Alexandria, VA), April 22, 1876.

courts being open and presided over by John C. Underwood. His position was justifiable but was undercut when he acknowledged that the situation in Virginia legally permitted a district court judge to hold court but maintained that so long as the military occupied Virginia, a Supreme Court justice could not attend. Chase did not want to preside over Davis's trial and used every reason to avoid the Richmond bench.

Recently, a scholar has characterized Chase as approaching "the business of the judiciary with reservation and humility."[6] Chase's protestations of being an impartial judge and his refusal to speak to Andrew Johnson about the Davis prosecution are pointed to as being evidence of his strict judicial bearing. This ignores, however, the clear evidence that he met with lawyers for Davis about the charge and gave them advice on how to proceed – three times going so far as to suggest avenues of approach to prevail against the government. And, on one of those occasions, Chase obliquely referred to his political aspirations. Even Chase's biographer and editor of his papers, John Niven, admitted that Chase's positions in the case "was in part at least motivated by political as well as practical considerations."[7] Frederick J. Blue, a biographer of Chase, wrote that "the trial might easily be an embarrassment to Chase, whether or not a guilty verdict was returned."[8] Chase's political ambition drove his actions in the Davis trial. Other than

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[6] Jonathan W. White, "The Trial of Jefferson Davis," in *Constitutionalism in the Approach and Aftermath of the Civil War*, edited by Paul D. Moreno and Johnathan O'Neill, (New York: Fordham University Press, 2013), 124.

[7] John Niven, *Salmon P. Chase: A Biography*, (New York: Oxford University Press, 1995), 409.

[8] Frederick J. Blue, *Salmon P. Chase: A Life in Politics*, (Kent: The Kent State University Press, 1987), 264.

Lucius H. Chandler, Salmon Chase bore the primary responsibility for Jefferson Davis not being tried for treason.

Andrew Johnson bears the responsibility for any failures of his administration, including the failure to bring Davis to trial for treason. Johnson never did change his conviction that rebel leaders should pay a price for their treason. The reason that Davis was not brought to trial, despite Johnson's desire – at least until the very end of his administration when he recognized the futility of putting Davis to trial – was that Johnson delegated the task to men he considered professionals in their field and allowed them to pursue the object without direct involvement from the president. One cannot help wondering what the outcome of the trial would have been had Thomas Jefferson been president and wanted Davis to face the charge, as Jefferson had pushed the Aaron Burr treason trial. Davis certainly would have heard a verdict rendered by the jury. But Andrew Johnson was not Jefferson; and, his participation in the Davis prosecution was limited to his clear direction to his cabinet members that he wanted the case tried. None of his three attorneys general could get the case to bar. While the treason indictments would be dismissed and Davis freed from that millstone, he lived out his life continuing to address a storm that would not cease.

The controversy revolving around the mistreatment of Union prisoners continued to haunt Davis until the end of his life. When amnesty was discussed in Congress in 1875, the proposed act erupted in contentious debate surrounding Davis's role in the deaths of Union prisoners of war. Democrats and Southerners believed that the Republicans were merely waiving the bloody shirt once again and were not sincere in

their opposition to granting Davis amnesty. But Andersonville and other Southern prisoner of war camps haunted Northerners who believed that someone in the rebel leadership –Davis, specifically – should pay for the crimes committed in those camps. The horrors there were real. The lives lost and the health destroyed of the many thousands of Northern men who were in those camps could not be forgotten or forgiven so soon after the war. Southern leaders might deny their knowledge of the extent of the suffering at these camps; they might deny that the suffering was worse than that experienced by Southern men in Union prisons; they might claim that the suffering was exaggerated; however, what they could not deny was that the North did not forgive them for the misery of their compatriots, sons, and husbands in the camps.

George Shea wrote a letter to the editor for publication in the *New York Tribune* that appeared on January 24, 1876. In it, he addressed the accusation still being made that Davis had "conducted the war in a manner not permitted by the rules of civilized nations, especially in the treatment of prisoners." As proof of the innocence of Davis on the charge, Shea pointed out that "the Government, by its conduct, having tacitly abandoned those special charges of inhumanity" when it transferred him from Fort Monroe to Richmond for trial on the treason indictment, essentially admitted that Davis had no complicity in the crime. "The apparent unwillingness of the Government to prosecute, under every incentive of pride and honour to prosecute, was accepted" as a confirmation that Davis was not guilty of the mistreatment of prisoners. Lack of proof sufficient to proceed to trial does not equate to innocence; nor, does the lack of will to

proceed to trial equate to it. But, the argument was simply too tempting for Shea to resist.[9] His protestations satisfied no one.

As Davis neared the end of his life, he wrote two lengthy articles for publication in *Belford's Magazine* that were subsequently published in pamphlet form. The first article appeared in January 1890, just after his death in December 1889. Varina Davis claimed that "it should be a complete vindication of the Confederate authorities before all fair-minded men."[10] The articles could do no such thing. Varina Davis's own actions reflected her fears that more needed to be done to convince history that her husband did not approve of the mistreatment of Union prisoners.

In 1890, just months after his death, Varina Davis published *Jefferson Davis, Ex-President of the Confederate States of America: A Memoir*, an apologia for her beloved husband. The second volume has a chapter entitled "The Exchange of Prisoners and Andersonville," in which she revisits the tired Confederate mantra regarding the Union being responsible for the end of prisoner exchanges after the Confederate congress had passed a law differentiating the treatment of African-American soldiers from that of white soldiers. Complete with charts and statistics, as well as the ever present comparisons between the death rates in Northern and Southern prisoner of war camps, Mrs. Davis conducts a spirited defense of her husband's policy towards Union prisoners

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[9] George Shea, *Jefferson Davis: A Statement Concerning the Imputed Special Causes of his Long Imprisonment by the Government of the United States, and of his Tardy Release by Due Process of Law*, (London: Edward Stanford, 1877), 3-16.

[10] Varina Davis, *Jefferson Davis, Ex-President of the Confederate States of America: A Memoir*, 2 vols. (New York: Belford Company, Publishers, 1890), 2:549.

of war. Meanwhile, she admitted that men at Andersonville died from heat and exposure, as well as a lack of medicine, while maintaining the position that many of the soldiers who were captured by the Confederate army were deserters, African-American soldiers, bowery roughs and gamblers, which apparently mitigated their subsequent treatment by the South.[11]

Still, in writing her memoirs, Varina Davis wanted to address the war crimes issue that haunted her husband. She wrote that "Mr. Davis was so painfully affected by the death-rate and suffering of the prisoners at Andersonville, that even in the few hours he spent at home their condition weighed dreadfully upon his spirits."[12] She then recounted an incident that she witnessed between Davis and the commanding general of the Army of Northern Virginia:

> One day I found General Lee there. Both were very grave, and the subject of their conference was the want and suffering at Andersonville, as portrayed by General Winder's private letter to the President. Mr. Davis said, 'If I could only get them across the trans-Mississippi, there beef and supplies of all kinds are abundant, but what can we do for them here?' General Lee answered quickly to this effect, 'Our men are in the same case, except that they are free. Their sufferings are the result of our necessities not of our policy. Do not distress yourself.'[13]

In one simple paragraph of her memoirs, Varina Davis admitted that Davis and Lee were perfectly aware of the "want and suffering at Andersonville" and the decision by Davis not to do anything about it.

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[11] Ibid. 2:537-538.
[12] Ibid. 2:573.
[13] Varina Davis, *Jefferson Davis*, 2:574.

The failure of the Union leadership to bring anyone to trial for treason lent itself to the argument that they *could not* have brought them to trial. Thaddeus K. Oglesby, a noted Southern defender and frequent speaker at Confederate Veteran reunions, availed himself of this tack. He had served as personal secretary to Alexander H. Stephens and spent his life attempting to re-write the history of the Confederacy. On March 20, 1899 he appeared before the Atlanta Camp of Confederate Veterans, in Atlanta, Georgia, to read a lengthy address to them presenting the Southern view that Davis was mistreated at Fort Monroe during his imprisonment after the end of the Civil War. His talk was entitled "The Shackling of Jefferson Davis." Union general Nelson Miles, whose duty it was to ensure that Davis did not escape, was the object of particular scorn during the lecture with much of the evidence of Davis' martyrdom being furnished by Varina Davis. As the speech began to wind down, Oglesby turned to the charge of treason that had been brought against Davis.

> The barbarous treatment of Jefferson Davis was due, as I have said, to the fact that he was the leader of the vanquished side. He was charged with having committed treason against the twenty-two States in joining the eleven States in their struggle to maintain the principle of the Declaration of Independence, but as, in doing so, he acted in conformity to the will and in obedience to the call of his own State, and as one State cannot commit treason against another State, the absurdity of the charge is apparent. Every well-informed person knew that it had no foundation in law or in fact. Unless the State of Mississippi could be lawfully convicted of treason against coequal, associate States, Jefferson Davis, a citizen of that State, could not be lawfully convicted of treason for remaining loyal to Mississippi instead of transferring his allegiance to the States that were making war on her.[14]

[14] Thaddeus K. Oglesby, *The Shackling of Jefferson Davis,* Read before the Atlanta Camp of Confederate Veterans, at the Capital, Atlanta,

Oglesby summed up his position by adopting the Southern myth that had been nurtured by him and many others throughout the South –Davis was charged with treason merely for being on the losing side of the war. Oglesby reached back, past the United States Constitution, which was the foundational document that not only defined treason but which formed the Union, to the Declaration of Independence as the underpinning of his argument for secession and vindication of Davis on the treason charge. The people's right to alter or abolish any form of government that has become destructive to the ends of life, liberty and pursuit of happiness was made clear by Jefferson's language, he argued. But he was not content to let the argument rest on the principles enunciated in the Declaration of Independence. Instead, as he stood before the Georgia Veterans and their families, he took a further step of asserting that the right of secession did exist and that a trial of Davis would have vindicated that right. He said that Davis:

> was never brought to trial for 'treason' or anything else, though *he eagerly wished and constantly urged a trial.* The United States Government would never put to the test of an investigation, in accordance with the constitution and laws of the land, the question whether or not he had committed treason against that government. *It was a test he greatly desired, and he was greatly disappointed at the government's declining it.* Had he been tried for treason the issue presented to the Supreme Court of the United States would have been precisely the same which was argued by Calhoun and Webster, precisely the same which was fought by Lee and Grant. That issue required an answer to the question: Did the States have a right to secede? For if the States had no right to secede, Jefferson Davis was a traitor. If they had a right to secede, he was a patriot. *This question the political heads of the government feared to submit to its own tribunal,*

Georgia, march 20, 1899," MS 382, Woodson Research Center, Fondren Library, Rice University.

> well remembering that in the Dred Scott decision that tribunal itself had placed the seal of constitutionality upon the principles for which the Southern statesmen and people stood. *By the release, without a trial, of Mr. Davis, the world was informed that the United States government feared to imperil in the courts of reason what it had gained in the field of battle*, and the result was a judgment by default, against the United States, that whereas the right of secession now no longer exists, nevertheless, and notwithstanding, the right of secession did exist, and Mr. Davis was not a traitor, but a patriot.[15]

Confederate veterans and their families were taught a course on constitutional history by Oglesby on that spring day in 1899. They learned that the Union, by not trying Davis for treason, had tacitly acknowledged that the South had been legally justified in breaking from the Union in 1861. The listeners found that *Dred Scott* would not have been overturned by the United States Supreme Court, but would have been upheld in principle. Those present for the reunion were given a defiant, and incorrect, view of the reasons why Davis was not tried for treason. It sowed the seed of resentment against the North that pervaded the South in those years.

The Southern view of why Davis was not tried has continued, in many circles, to be based upon a mistaken belief that he was not tried because he was correct in his constitutional beliefs. Well into the twentieth-century, historians wrote of the harsh treatment of Southerners after the war. Reconstruction was treated as a retributive era of the nation's history. "Certain it is that only a few besides President Davis dimly foresaw

[15] Ibid.

the vindictiveness of the conquerors,"[16] is a typical statement involving the years following the American Civil War and the treatment of Davis. The victors of the war did not treat the rebel leaders harshly. One man was imprisoned for two years and then set free.

Even though the Johnson Administration never decided that treason prosecutions of rebel leaders violated a basic American policy that this crime should only be sparingly brought to bar, the long term consequence was just that. The significance of there being no treason prosecution after the Civil War that resulted in the conviction or execution of any leader of the Confederacy is typically understated or ignored altogether. The four years of the rebellion had tested the federal government in a manner never before experienced. By the time that the indictment against Davis was dismissed, Article III, Section 3 of the Constitution was implicitly acknowledged to not represent a primary protection of the security of the American government. This was a positive development in the law. Since breaking from England, Americans had recognized the ability to misuse the treason statute. The Aaron Burr prosecution confirmed that understanding. The failure to try Davis after the war, when the clearest possibility existed of credibly taking the constitutional crime to a jury, came to herald the hesitancy of the American government to use the law. By 1945, Associate Justice Robert Jackson of the United States Supreme Court, writing the majority opinion in *Cramer v. United States*, stated

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[16] William M. Robinson, Jr., *Justice in Grey: A History of the Judicial System of the Confederate States of America,* (Cambridge: Harvard University Press, 1941), 629.

that "after constitutional requirements have been satisfied, and after juries have convicted and courts have sentenced, Presidents again and again have intervened to mitigate judicial severity or to pardon entirely. We have managed to do without treason prosecutions to a degree that probably would be impossible except while a people was singularly confident of external security and internal stability."[17] This can only be viewed as a triumph of American jurisprudence.

[17] *Cramer v. United States,* 325 U.S. 1, at 25 (1945).

APPENDIX A

UNDERWOOD'S CHARGE TO THE MAY 1865 GRAND JURY

Gentlemen of The Grand Jury: You have been sworn to the discharge of duties most momentous and responsible.

You will be compelled by your regard for country, freedom and humanity to present for trial the authors and conductors of the most gigantic bloody and unprovoked crimes that ever cursed our world. You are to pass upon these who caused not only tens and thousands of deaths on the battle fields of the Rebellion, but the greater agonies and tortures of starvation in Libby Prison, on Belle Island, at Salisbury and Andersonville, in comparison with which the cruelties of Spanish inquisitions, the massacres of St. Bartholomew, and of the French revolutions, sink into insignificance. You are to review the conduct and motives of men whose lust of power and greed of gain are without a parallel; whose thirst for notoriety, strangely desired and courted, and finally acquired the public gaze, only to sink them to disgrace and infamy. There has been nothing so terrible since the Crucifixion as this conspiracy against the mildest and best Government the human race had ever known – against liberty and humanity and in the interest of Slavery and despotic power – until it has culminated in an assassination which has shaken all Christendom with horror and abhorrence.

It is saddening to reflect that our own beautiful State has been the principal theater of this treason and carnage, and that many of our fellow citizens, who have been honored by our condense and suffrages, have thus raised their hands against the life of our nation.

The crime of treason though new and strange to our courts of justice, is clearly defined in our laws and constitution.

It consists, as described in Article 3, Section 3, of the United States Constitution, in levying war against the United States, or in adhering to their enemies, giving them aid and comfort, and includes commissionaires and quartermasters, contractors and civil agents of Rebellion, who are not less guilty that those who bore arms.

The District-Attorney will furnish you with the acts of Congress passed to enforce this provision of the Constitution, which define also the interior crime of his prison of treason and that of giving aid and comfort to the enemy.

In a condition of affairs like that which now surrounds us, when those who are technically guilty of treason, may be counted by hundreds of thousands, a universal prosecution would be unreasonable and impossible. We know that the masses of our people, not only citizens, but soldiers, conscripted and driven into the Rebel service, are not morally responsible for the Rebellion. Unlike the citizens of the Northern States where education is generally diffused, and almost every man reads his Bible and

newspaper, our poor people have been deprived of their advantages by the proud and tyrannical aristocracy, and have been despotically controlled by their wicked leaders, and are, therefore, rather to be pitied than punished more severely than they have been already. We are now living under the Christian Dispensation, and would not say like Joshua: "Everyone who rebels shall be put to death."

But the enforced ignorance of our poor people, which alone made the Rebellion possible, and therefore may excuse the masses, only increases the guilt of the ruling leaders, who before committing the crime of treason, had prepared the way by keeping their poorer neighbors in ignorance, and thereby secured to themselves the undisturbed possession of all positions of influence and authority.

It will be for you to decide who and how many of the most prominent and guilty, are to answer to the violated laws of the country. The eyes of the nation and of all Christendom are upon you. It will be expected that by your action, you will declare that treason, like all other crimes, shall be punished in this home of liberty and justice. Civilization demands this, hot in vengeance, not as indemnity for the past, but as some security for the future of our republican institutions. There seems to have been a fatal ignorance or forgetfulness on the part of our aristocracy of their duties and we have witnessed the frightful consequences, in a land desolated by civil war, drenched with the blood of our slaughtered brethren, furrowed with graves and filled with windows and orphans.

We have seen as no other State or people have seen, the treason is the greatest of crimes. That it is whole sale murder and embraces in its comprehensive sweep all the crimes of the decalogue. It has already murdered tens of thousands of the flower of our youth and manhood, by slaughter on our battle fields, and by starvation in the most loathsome dangerous. It has invaded almost every domestic circle in the country, scattering woe and death, breaking the hearts of wives and mothers and sisters. It had poisoned the wells of truth and loyalty, teaching terrible instructions; and yet the grand instigators and most responsible and intelligent principals of this great conspiracy, with hands dripping with blood of our slaughtered innocents and martyred President are still at large unwhipped of justice.

It is for you to teach them that those who sow the wind must reap the whirlwind, that clemency and mercy to them would be cruelty and murder to the innocent and unborn.

It is your business so to administer the laws that out children's children will not be compelled to look upon a rebellion like the one we have seen, for many generations.

To an inquiry which has been made by an officer of the Court, whether the terms of parole agreed upon by Gen. Lee were say protection to those taking the parole, the

answer is, that was a mere military arrangement, and can have no influence upon civil rights or statue of the person interested.

APPENDIX B

DAVIS INDICTMENT MAY 1866

The United States of America

District of Virginia, to wit.

In the Circuit Court of the United States of America in and for the District of Virginia, at Norfolk.

May Term 1866

The Grand Jurors of the United States of America, in and for the District of Virginia, upon their oaths and affirmations, respectively do present, that Jefferson Davis, late of the city of Richmond, in the county of Henrico, in the District of Virginia aforesaid, yeoman, being an inhabitant of, and residing within the United States of America, and owing allegiance and fidelity to the said United States of America, not having the fear of God before his eyes, nor weighing the duty of his said allegiance, but being moved and seduced by the instigation of the devil, and wickedly devising, intending the peace and tranquility of the said United States of America to disturb, and the government of the said United States of America, to subvert, and to stir, move and incite insurrection, rebellion, and war, against the said United States of America on the fifteenth day of June in the year of our Lord, one thousand eight hundred, and sixty-four in the city of Richmond, in the county of Henrico, in the District of Virginia aforesaid, and within the jurisdiction of the Circuit Court of the Unites States for the fourth circuit in and for the District of Virginia aforesaid, with force and arms unlawfully, falsely, maliciously, and traitorously, did compass, imagine, and intend to raise, levy, and carry on war, insurrection and rebellion, against the said United States of America, and in order to fulfill, and bring to effect the said traitorous compassings, imaginations and intentions of him, the said Jefferson Davis, he, the said Jefferson Davis, afterwards to wit, on the said fifteenth day of June in the year of our Lord one thousand eight hundred and sixty four in the said city of Richmond, in the county of Henrico, and District of Virginia aforesaid, and within the jurisdiction of the Circuit Court of the United States in the Fourth Circuit, in, and for the said District of Virginia, with a great multitude of persons, whose names to the jurors aforesaid are at present unknown, to the number of five hundred persons and upwards, armed and arrayed in a warlike manner, that is to say with cannons, muskets, pistols, swords, dirks, and other warlike weapons, as well offensive as defensive, being then and there unlawfully, maliciously, and traitorously assembled, and gathered together, did falsely, and traitorously assemble and join themselves together against the said United States of America, and then and there, with force and arms, did falsely and traitorously and in a

warlike and hostile manner array and dispose themselves against the said United States of America, and then and there that is to say, on the said fifteenth day of June in the year of our Lord, one thousand eight hundred, and sixty four in the said city of Richmond in the county of Henrico, and district of Virginia aforesaid, and within the jurisdiction of the said Circuit Court of the United States for the Fourth Circuit in and for the said District of Virginia in pursuance of such their traitorous intentions and purposes aforesaid, he, the said Jefferson Davis with the said persons so as aforesaid traitorously assembled, and armed, and arrayed, in the manner aforesaid, most wickedly, maliciously, and traitorously, did ordain, prepare, levy, and carry on war against the said United States, contrary to the duty of the allegiance and fidelity of the said Jefferson Davis, against the Constitution, government, peace and dignity of the said United States of America, and against the form of the statute of the said United States of America in such case made and provided.

This indictment found on the testimony of James F. Milligan, George P. Searbury, John Good, Jr., J. Hardy Hendren, and Patrick O'Brien, sworn in open court and sent for by the grand jury.

L.H. Chandler United States Attorney for the District of Virginia

APPENDIX C

DAVIS INDICTMENT MARCH 26, 1868

Circuit Court of the United States of America for the District of Virginia.

At a stated term of the Circuit Court of the United States of America, for the District of Virginia in the Fourth Circuit, begun and holden at the City of Richmond, within and for the District and Circuit aforesaid, on the fourth Monday of November, and on the twenty fifth day of the said month, in the year of our Lord one thousand Eight hundred and Sixty seven and continues by adjoinment to the twenty sixth day of March, one thousand Eight hundred and sixty-eight.

The Grand Jurors of the United States of America, in and for the District of Virginia, upon their oath and affirmation respectively as find and present, that Jefferson Davis, late of the City of Richmond, in the county of Henrico, and District of Virginia, Gentleman, being a citizen and inhabitant of, and residing within the said United States, under the protection of the laws of the said United States, and owing allegiance and fidelity to the said United States, not being mindful of his said duty of allegiance, and wickedly devising and intending the peace of the United States to disturb, and to excite and levy war against the said United States, on the first day of June, in the year one thousand eight hundred and sixty-one, at Richmond aforesaid, did unlawfully and traitorously collect, and assist in collecting great numbers of persons armed, equipped, and organized as military forces, for the purpose of levying war against the said United States, and did assume the command in chief of said forces, and with the said forces did, unlawfully and traitorously, take forcible possession of said city of Richmond, and said county of Henrico, and did, by force of arms, exclude therefrom all authority of the said United States, and all persons acting under the same and did with said forces occupy the said city and county and exclude therefrom the armed forces of the United States, sent by the government of the said United States to maintain the authority of the same in said city and county. And so the Grand Jurors aforesaid, on their oaths and affirmations aforesaid, do say, that the said Jefferson Davis, on the said first day of June in the year of our Lord one thousand eight hundred and sixty one, at said Richmond, being a person owing allegiance to the said United States, did, maliciously and traitorously, levy war against the said United States, and did commit the crime of treason against the said United States, against the peace and dignity of the United States of America, contrary to the form of the Statute respecting the crime of treason, approved on the thirtieth day of April in the year one thousand seven hundred and ninety.

And the Grand Juror aforesaid, upon their oaths and affirmations aforesaid, do further find and present, that Jefferson Davis, late of Richmond aforesaid, gentleman being an inhabitant of, and residing within the United States of America, and owing allegiance and fidelity to said United States, did, on the first day of June, in the year one thousand eight hundred and sixty one, maliciously ad traitorously collect, and assist in collecting great numbers of persons armed, equipped, and organized as military forces, for the purpose of levying war against the said United States, and did assume the command of chief of said forces, and with the said forces did, unlawfully and traitorously take forcible possession of said Richmond, and said county of

Henrico, and did, by force of arms, exclude therefrom all authority of the said United States, and all persons acting under the same, and did with said forces occupy the said city and county, and exclude therefrom the armed forces of the United States sent by the government of the United States to maintain the authority of the same in the said city and county.

And so the Grand Jurors aforesaid, on their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said first day of June in the year one thousand eight hundred and sixty one, at said Richmond, being a person owing allegiance to the said United States did, maliciously and traitorously, levy war against the said United States, and did commit the crime of treason against the said United States, against the peace and dignity of the United States of America, and contrary to the form of the statute respecting the crime of treason approved on the seventeenth day of July, in the year one thousand eight hundred and sixty-two.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that on the first day of August, in the year of our Lord one thousand eight hundred and sixty two, a great many persons whose names are to the Grand Jurors unknown, to the number of one hundred thousand and more, were assembled around equipped, and organized as military forces, with the usual weapons of war, and were maliciously and traitorously engaged in levying war against the said United States, in said Richmond, in said county of Henrico, and in the District of Virginia aforesaid, and in several states of the United States, to wit, the states of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, Tennessee and Missouri. And that the said Jefferson Davis, at Richmond aforesaid, on the said first day of August, being an inhabitant of, and residing within, and owing allegiances to the said United States, well knowing that the said military forces organized as aforesaid were engaged, maliciously and traitorously, in levying war against the said United States, did, send to, and procure for, the said forces, munitions of war, provision, and clothing, and did give to the said forces information, counsel, and advice maliciously and traitorously to assist them in the levying of war as aforesaid .And so the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said first day of August, at Richmond aforesaid, did, maliciously and traitorously levy war against the United States ,and did commit the crime of treason against the said United States, against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that at a place called Manassas, in the said District of Virginia, on the twenty first day of July, in the year one thousand eight hundred and sixty one, a great number of persons whose names to the Grand Jurors are unknown, to the number of fifty thousand, and more, were assembled, armed, equipped and organized as military forces, with the usual weapons of war, and were maliciously and traitorously fighting against, killing, wounding, and capturing officers and soldiers of the army of the United States, and destroying and capturing munitions and materials of war, being the property of the United States, and were then and there maliciously and traitorously levying war against the said United States and that the said Jefferson Davis, at said Manassas, on the said twenty-first day of July, maliciously and traitorously did join himself to, and take part with, and assist by direction, advice, and encouragement the said military forces then and there levying war against the said United States, as aforesaid. And as the Grand Jurors aforesaid, on their oaths and

affirmations aforesaid, do say, that the said Jefferson Davis, on the said twenty-first day of July, at Manassas aforesaid, did maliciously and traitorously levy war against the United States, and did commit the crime of treason against the said United States, against the peace and dignity of the United States of America, and contrary tot eh form of the statute respecting the crimes of treason approved on the thirtieth day of April in the year one thousand seven hundred and ninety.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present, that the said Jefferson Davis, late of the city o Richmond aforesaid, Gentleman, being an inhabitant of, and residing within the said United States of America, and owing allegiance and fidelity to the said United States, did at Richmond aforesaid, on the twenty-fifth day of May, in the year one thousand eight hundred and sixty one, conspire and unite with Robert E. Lee, Judah P. Benjamin, John C. Breckenridge, William Mahone, Henry A. Wise, John A. Wise, John Letcher, William Smith, Jubal A. Early, James Longstreet, Daniel H. Hill, Ambrose P. Hill, Gustave T. Beauregard, William H. C. Whiting, Edward Sparrow, Samuel Cooper, Joseph E. Johnston, John B. Gordon, Clairborne F. Jackson, and F. O. Moore, and with other persons whose names are to the sad Grand Jurors unknown to the number of one hundred thousand, to levy war against the said United States, and that then and thereafter, in pursuance thereof, there were assembled and collected together a great number of persons, including the said Jefferson Davis, and the said Robert E. Lee, Judah P. Benjamin, John C. Breckenridge, William Mahone, Henry A. Wise, John Letcher, William Smith, Jubal A. Early, James Longstreet, Daniel H. Hill, Ambrose P. Hill, Gustav T. Beauregard, William H. C. Whiting, Edward Sparrow, Joseph E. Johnston, John B. Gordon, Claiborne Jackson, and T.O Moore, and the other persons whose names are to the Grand Jurors aforesaid unknown, armed, equipped, and organized as military forces, with the usual weapons of war, maliciously and traitorously levying war in the said District of Virginia, and in the state of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, Tennessee, and Missouri, and that the said Jefferson Davis was selected and appointed, by the persons aforesaid, as Commander in Chief of the forces aforesaid, and was by the said forces recognized and obeyed as commander in Chief, as aforesaid, and that the said Jefferson Davis, of the city of Richmond aforesaid, on the said twenty fifth day of May well knowing that the said military forces was levying war against the said United States, did accept the office and duty of Commander in Chief of the said forces, engaged in levying war as aforesaid, and did then and there, direct, counsel, assist, and encourage the said forces, and did maliciously and traitorously act as such Commander in Chief of said military forces in the levying of war against the said United States, as aforesaid. And so the Grand Jurors aforesaid, on their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said twenty fifth day of May, at said city of Richmond, being a person owing allegiance to the said United States, did, maliciously and traitorously, levy war against the said United States, against the peace and dignity of the said United States of America, and contrary to the form of the statute in such case made and provided.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, as further find and present, that on the second da of August, in the Year one thousand eight hundred and sixty four, there were collected and gathered together a great many persons whose names are to the Grand Jurors unknown, of the number of one hundred thousand, armed, equipped, and organized as

military forces, and as such engaged, maliciously and traitorously in levying war against the said United States and the said Jefferson Davis at Richmond aforesaid on the said second day of August, being an inhabitant of and residing within the United States of America, and owing allegiance to the said United States, and well knowing that the said military forces were engaged in levying war against the said United States, as aforesaid, did act as commander of and forces in their said levying of war, and did, then and there, appoint in said forces, to act as commander of a brigade of said forces Girardi then acting as captain in said forces, to act as commander of a brigade of said forces as levying war, as aforesaid, and did maliciously and traitorously appoint one Mahoney to be a Major General of said forces, so levying war as aforesaid, and did direct one James A. Seddon to examine into the position of certain of the said forces, to wit, a regiment of the Infantry Commanded by one William Butler, and to ascertain whether the said Butler could be spared from his said regiment without injury to the service of levying war against the said United States.

And so the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said second day of August, at said Richmond, being a person owing allegiance to the said United States, did maliciously and traitorously levy war against the said United States, and did commit the crime of treason against the said United States, against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present, that on the ninth day of February in the year one thousand eight hundred and sixty four, at Richmond aforesaid, there were collected and gathered together a great many persons whose names are to the Grand Jurors unknown , armed, equipped and organized as military forces of the number of one hundred thousand, and as such forces engaged maliciously, and traitorously in levying war against the said United States, and that the said forces were then generally known by the name of the armies of the Confederate States and that the said Jefferson Davis on the said ninth day of February being an inhabitant of, and residing within the United States of America, and owing allegiance to the said United States, and well knowing that the said forces were levying war against the United States, was acting as the Commander in Chief of the said forces, and did, then and there, maliciously, and traitorously, as such Commander in Chief, issue an address to the said forces in the words and figures following to wit, “Adjutant and Inspector General’s office, Richmond, Feb. 10, 1864. General Orders, no. 19.

The following address of the president is published for the information of the army: Soldiers of the armies of the Confederate States: In the long and bloody war in which your country is engages, you have achieved many noble triumphs, you have won glorious victories over vastly more numerous hosts You have cheerfully borne privations and toil to which you were unused. You have readily submitted to restraints upon your individual will, that the citizen might better perform his duty to the state as a soldier. To all these you have lately added another triumph, the noblest of human conquests - a victory over yourselves. As the times drew near when you who first entered the service might well have been expected to relief from your arduous labors and restoration to the endearments of home, you have heeded only the call of your suffering country. Again you come to tender your services for the public defense – a free offering, which only such

patriotism as yours could make – a triumph worthy of you and of the cause to which you are devoted.

I would in vain attempt adequately to express the emotions with which I received the testimonials of confidence and regard which you have recently addressed to me. To some of those first received, separate acknowledgments were returned. But it is now apparent that a like generous enthusiasm pervades the whole army and that the only exception to such magnanimous tender will be of those who, having originally entered for the war, cannot display anew their zeal in the public service. It is, therefore, deemed appropriate, and, it is hoped, will be equally acceptable, to make a general acknowledgment, instead of successive special responses. Would that it were possible to render my thanks to you in person, and in the name of our Common Country, as well as in my own, while pressing the hand of each war-worn veteran, to recognize his title to our love, gratitude and admiration.

Soldiers! by your will (for you and the people are but one) I have been placed in a position which debars me from sharing your danger, your suffering, and your privations in the field. With pride and affection my heart has accompanied you in every march; with solicitude it has sought to minister to your every want; with exultation it has marked your every heroic achievement; yet, never in the toilsome march, nor in the weary watching, nor in the desperate assault, have you rendered a service so decisive in results as in this last display of the highest qualities of devotion and self-sacrifice which can adorn the character of the war patriot. Already the pulse of the whole people beats in union with yours. Already they compare your spontaneous and unanimous offer of your lives for the defense of your country, with the halting and reluctant service of the mercenaries 84 who are purchased by the enemy at the price of higher bounties than have hitherto been known in war. Animated by the contrast, they exhibit cheerful confidence and more resolute bearing. Even the murmurs of the weak and timid, who shrink from the trials which make stronger and firmer your noble natures, are shamed into silence by the spectacle which you present. Your brave battle-cry will ring loud and clear through the land of the enemy, as well as our own; will silence the vain-glorious boasting of the corrupt partisans and their pensioned press; and will do justice to the calumny by which they seek to persuade a deluded people that you are ready to purchase dishonorable safety by degrading submission. Soldiers! the coming spring campaign will open under auspices well calculated to sustain your hopes. Your resolution needed nothing to fortify it. With ranks replenished under the influence of your example, and by the aid of your representatives, who give earnest of then purpose to add by legislation largely to your strength, you may welcome the invader with a confidence justified by the memory of past victories. On the other hand, debt, taxation, repetition of heavy drafts, dissensions occasioned by the strife for power, by the pursuit of the spoils of office, by the thirst for plunder of the public treasury, and, above all, the consciousness of a bad cause, must fall with fearful force upon the over-strained energies of the enemy. His campaign in 1864 must, from the exhaustion of his resources, both in men and in money, be far less formidable than those of the last two years, when unimpaired means were used with boundless prodigality, and with results which are suggested by the mention of the glorious names of Shiloh, and Perryville, and Murfreesboro, and Chickamauga, and the Chickahominy, and Manassas, and Fredericksburg, and Chancel-lorsville. Soldiers! assured success awaits us in our holy struggle for liberty and independence, and for the

preservation of all that renders life desirable to honorable men. When that success shall be reached, to you,—your country's hope and pride,—under divine Providence, will it be due. The fruits of that success will not be reaped by you alone, but by your children, and your children's children, in long generations to come, will enjoy blessings derived from you that will preserve your memory ever-living in their hearts. Citizens—defenders of the homes, the liberties, and the altars of the Confederacy!—that the God whom we all humbly worship may shield you with His fatherly care, and preserve you for a safe return to the peaceful enjoyment of your friends and the association of those you most love, is the earnest prayer of your commander-in-chief. Jefferson Davis. Richmond, 9th February, 1864. By order: S. Cooper, Adjutant and Inspector-General,'—encouraging, conniving and advising the said forces to continue levying war against the said United States.

"And so the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said ninth day of February, at said Richmond, being a person owing allegiance to said United States, did maliciously and traitorously levy war against the said United States, and did commit the crime of treason against the said United States, against the peace and dignity of said United States of America, and contrary to the form of the statute in such case made and provided.

"And the grand jurors aforesaid, upon their oaths and affirmations, do further find and present that, on the fifth day of January, in the year eighteen hundred and sixty-four, there were collected and gathered together a great many persons whose names are to the grand jurors unknown, of the number of one hundred thousand, armed, equipped, and organized as military forces, with the usual weapons of war, and as such forces engaged maliciously and traitorously in levying war against the United States in the district of Virginia, and in the states of Georgia and South Carolina, and that the said Jefferson Davis, at Richmond, in the district of Virginia, on the said fifth day of January, being an inhabitant of, and residing within the United States of America, and owing allegiance to said United States, and well knowing that the said forces were levying war as aforesaid, did maliciously and traitorously direct that a large number of said forces, to wit, fifteen thousand men, known as the 'Local Defense Men,' should be sent to defend the country and railroads between Charleston, in said South Carolina, and Savannah, in said Georgia, against the authorities and armies of said United States, and did maliciously and traitorously direct that certain other of said forces, so levying war as aforesaid, should continue to defend said Charleston against said authorities and armies of said United States, he, the said Davis, at that time acting as commander-in-chief of said forces.

"And so the said grand jurors, upon their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said fifth day of January, at said Richmond, being a person owing allegiance to the said United States, did maliciously and traitorously levy war against the said United States, and did commit the crime of treason against the said United States, against the peace and dignity of the said United States of America, and contrary to the form of the statute in such case made and provided.

"And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present that, on the fourth day of January, in the year eighteen hundred and sixty-four, there were collected and assembled a great many persons whose names are to the grand jurors unknown, and of the number of one hundred thousand, armed, equipped, and organized as military 85 forces, and as such engaged maliciously and traitorously in levying war against the said United States, in the said district of Virginia, and in the state of North Carolina, and within other places within the United States, and that the said Jefferson Davis, at Richmond aforesaid, on the said fourth day of January, being an inhabitant of, and residing within the said United States, and well knowing that the said military forces were engaged in levying war against said United States, as aforesaid, did act as commander-in-chief of said forces in their said levying of war, and did then and there direct that a brigade of said forces should be sent to a place called Goldsboro, in the said state of North Carolina, maliciously and traitorously the said brigade then and there to fight against, kill, wound, and capture the officers and soldiers of the armies of the United States, there employed by the government of the said United States in upholding its authority.

"And as the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said fourth day of January, at Richmond aforesaid, being a person owing allegiance to the said United States, did maliciously and traitorously levy war against the said United States, and did commit the crime of treason against the said United States; against the peace and dignity of the said United States of America, and contrary to the form of the statute in such case made and provided.

"And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present, that Jefferson Davis, late of the city of Richmond aforesaid, gentleman, being an inhabitant of and residing within the United States of America, and owing allegiance and fidelity to the said United States, did on the twenty-fifth day of March, in the year of our Lord one thousand eight hundred and sixty-five, at Richmond aforesaid, unlawfully, falsely, wickedly, maliciously, and traitorously counsel and abet Robert E. Lee, Judah P. Benjamin, John C. Breckinridge, William Mahone, Henry A. Wise, John Letcher, William Smith, Jubal A. Early, James Long-street, Daniel H. Hill, Ambrose P. Hill, Gustave T. Beauregard, William H. C. Whiting, Edward Sparrow, Samuel Cooper, Joseph E. Johnston, John B. Gordon, Claiborne F. Jackson and F. O. Moore, being persons owing allegiance to the said United States, and divers other persons, to the number of one thousand, whose names to the grand jurors aforesaid are unknown, also owing allegiance to the said United States, in and to, then and there, unlawfully, falsely, wickedly, maliciously, and traitorously combining and confederating together to levy war against the said United States, with the intent then and there to subvert the power thereof, and the said Robert E. Lee, together with the said other persons unknown to the grand jurors aforesaid, and the said Jefferson Davis, did then and there so unlawfully, falsely, wickedly, maliciously, and traitorously combine and confederate together for the purpose aforesaid, and did then and there levy war against the said United States of America, and the said Jefferson Davis, and the said Robert E. Lee, and the said other persons known as well as the said other persons unknown to the grand jurors aforesaid, confederates in pursuance of said unlawful, false, wicked, malicious, and traitorous combination and confederation, then and there collected large armies, constituting together one hundred thousand men and more, to levy and carry on war against the said United

States. And the said Jefferson Davis, then and there falsely, wickedly, maliciously, and traitorously, and unlawfully commanded to make and carry on war upon and against the said United States, and the said armies did then and there, in obedience to the said command of the said Jefferson Davis, levy and carry on war upon and against the said United States, and the said Jefferson Davis then and there, to wit, on the said twenty-fifth day of March, did order, direct, and command the said Robert E. Lee, and the said other persons known as well as the said other persons unknown to the grand jurors aforesaid, to assault, fight, wound and capture, and kill the said officers and soldiers in the military service of the said United States, the said officers and soldiers being then in a fortification and fort known as and called Port Steadman, which said fortification and fort was at and near the city of Petersburg, in the district of Virginia, within the jurisdiction of the court, and then was in the possession and occupancy of the said United States; and the said Robert E. Lee, and the said other persons known as well as said persons unknown to the grand jurors aforesaid, in obedience to the command of said Jefferson Davis, did then and there assault, fight, wound, and capture, and kill the said officers and soldiers in the military service of the said United States, in the said fortification and fort.

"And so the grand jurors aforesaid, upon their oaths and affirmations, do say that the said Jefferson Davis, on the said twenty-fifth day of March, in the year of our Lord one thousand eight hundred and sixty-five, at the said city of Richmond, being a person owing allegiance to the said United States, did, contrary to the duty of said allegiance, unlawfully, wickedly, falsely, maliciously, and traitorously levy war against the said United States, as aforesaid, and did then and there so commit one and more overt acts of treason against the said United States, as aforesaid, against the peace and dignity of said United States, in contempt of the laws, in violation of his duty of allegiance, and contrary to the form of the statute in such case made and provided. "And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present, that Jefferson Davis, late of the city of Richmond aforesaid, gentleman, being an inhabitant of and residing within the said United States, and owing allegiance and fidelity to the said United States, did, at the city of Richmond aforesaid, on the thirty-first day of March, one thousand eight hundred and sixty-five, unlawfully, falsely, wickedly, and maliciously and traitorously counsel and abet Robert E. Lee, Judah P. Benjamin, John C. Breckinridge, William Mahone, Henry A. Wise, John Letcher, William Smith, Jubal A. Early, James Longstreet, Daniel
H. Hill, Ambrose P. Hill, Gustave T. Beauregard, William H. C. Whiting, Edward Sparrow, Samuel Cooper, Joseph E. Johnston, John B. Gordon, Claiborne F. Jackson, and F. O. Moore, being persons owing allegiance to the said United States, and divers other persons to the number of one thousand, whose names are to the grand jurors aforesaid unknown, also owing allegiance to said United States, in and there and then falsely, wickedly, maliciously, and traitorously combining and confederating together to levy war against said United States, with the intent then and there to subvert the power thereof; and the said Robert E. Lee, together with the said other persons known as well as the said other persons unknown to said grand jurors, and the said Jefferson Davis, did then and there so unlawfully, falsely, and traitorously combine and eon- federate together for the purpose aforesaid, and did then and there levy war against said United States, and the said Jefferson Davis, and the said Robert E. Lee, and the said persons known as well as said persons unknown to the grand jurors aforesaid, confederates, in pursuance of the said unlawful, false, wicked, malicious, and traitorous combination and confederation, then and there

called large armies constituting together one hundred thousand men and more, to levy and carry on war against said United States. And the said Jefferson Davis, then and there falsely, wickedly, and maliciously and traitorously commanded armies to levy, make, and carry on war against said United States, and the said armies did then and there, in obedience to said command of said Jefferson Davis, levy and carry on war against said United States, and the said Jefferson Davis, then and there, to wit, on the said thirty-first day of March, did order, direct, and command said Robert E. Lee, and the said other persons known as well as said persons unknown to the said grand jurors aforesaid, to assault, wound, capture, and kill the officers and soldiers of said United States, then being in martial array at and near Dinwiddie Court-House, in the county of Dinwiddie, and district of Virginia aforesaid, and within the jurisdiction of the court; and the said armies so collected by the said Jefferson Davis as aforesaid, and the said Robert E. Lee, and the said other persons known as well as said other persons unknown to the grand jurors aforesaid, in obedience to the command of said Jefferson Davis, did then and there assault, fight, wound, and capture, and kill the said officers and soldiers in the said military service of the said United States, and so the grand jurors aforesaid, upon their respective oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said thirty-first day of March, one thousand eight hundred and sixty-five, at the said city of Richmond, being a person owing allegiance to said United States, did, contrary to his duty of his said allegiance, unlawfully, falsely, wickedly, maliciously, and traitorously levy and carry on war against said United States as aforesaid, and aid them, and did then and there, so become, and was guilty of treason against the United States aforesaid, against the peace of the said United States, in contempt of the laws, in violation of his duty of allegiance, and contrary to the form of the statute in such case made and provided.

"And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present, that Jefferson Davis, late of the city of Richmond aforesaid, gentleman, being an inhabitant of and residing within the United States of America, and owing allegiance and fidelity to said United States, did, at the city of Richmond aforesaid, on the first day of April, in the year of our Lord one thousand eight hundred and sixty-five, unlawfully, falsely, wickedly, maliciously, and traitorously counsel and abet Robert E. Lee, Judah P. Benjamin, John C. Bredcinridge, William Mahone, Henry A. Wise, John Letcher, William Smith, Jubal A. Early, James Longstreet, Daniel H. Hill, Ambrose P. Hill, Gustave T. Beauregard, William H. C. Whiting, Edward Sparrow, Samuel Cooper, Joseph E. Johnston, John B. Gordon, Claiborne F. Jackson, and F. O. Moore, being persons owing allegiance to said United States, and divers other persons to the number of one thousand, whose names to the grand jurors aforesaid are unknown, also owing allegiance to the said United States, in and to, then and there, unlawfully, falsely, wickedly, maliciously, and traitorously combining and confederating together to levy war against said United States, with the intent then and there to subvert the power thereof, and the said Robert
E. Lee, together with said other persons known as well as those unknown to the grand jurors aforesaid, and the said Jefferson Davis, did then and there, so unlawfully, falsely, traitorously, maliciously, combine and confederate together for the purpose of making war against said United States, and did then and there levy war against the United States as aforesaid. I And the said Jefferson Davis, and the said Robert E. Lee, and the said other persons known as well as said other persons unknown to the grand jurors, confederates, in pursuance of the said unlawful, false, wicked, malicious, and traitorous combination and confederation, then and there collected large

armies, constituting one hundred thousand men and more, to levy and carry on war against said United States. And the said Jefferson Davis, then and there, to wit, on the said first day of April, did order, direct, and command said Robert E. Lee, and the said persons known as well as said persons unknown to the grand jurors aforesaid, to assault, wound, fight, capture, and kill the officers and soldiers in the military service of said United States, then being in martial array for the defense of the authority of said United States, at and near a place known and called the Five Forks, in the district of Virginia aforesaid, and within the jurisdiction of this court, and the said armies so collected by the said Robert E. Lee, and said other persons known as well as said other persons unknown to the grand jurors aforesaid, in obedience to the command of the said Jefferson Davis, did then and there assault, fight, capture, and kill the said officers and soldiers in the said military service of said United States.

"And so the grand jurors aforesaid, on their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said first day of April, one thousand eight hundred and sixty-five, at the said city of Richmond, within the jurisdiction of this court, being a person owing allegiance to the said United States, did, contrary to his duty of said allegiance, unlawfully, maliciously, and traitorously levy and carry on war against said United States as aforesaid, and did then and there so become, and was guilty of treason against said United States, as aforesaid, against the peace of said United States, in contempt of the laws and in violation of his duty of allegiance, and contrary to the form of the statute in such case made and provided.

"And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present, that Jefferson Davis, late of the city of Richmond aforesaid, gentleman, being an inhabitant of, and residing within the United States of America, and owing allegiance and fidelity to said United States, and at the city of Richmond aforesaid, on the second day of April, in the year of our Lord one thousand eight hundred and sixty-five, did unlawfully, maliciously, and traitorously counsel and abet Robert E. Lee, Judah P. Benjamin, John C. Breckinridge, William Mahone, Henry A. Wise, John Letcher, William Smith, Jubal A. Early, James Longstreet, Daniel H. Hill, Ambrose P. Hill, Gustave T. Beauregard, William H. C. Whiting, Edward Sparrow, Samuel Cooper, Joseph E. Johnston, John B. Gordon, Claiborne F. Jackson, and F. O. Moore, being persons owing allegiance to said United Slates, and divers other persons owing allegiance to said United States, to the number of one hundred thousand, whose names are to the grand jurors unknown as aforesaid, in and to, then and there unlawfully, falsely, maliciously, and traitorously combining, confederating together to levy war against said United States, with intent then and there to subvert the power thereof, and the said Robert E. Lee, together with said other persons known as well as the said other persons unknown to said grand jurors, and the said Jefferson Davis, did, then and there, so unlawfully, falsely, maliciously, and traitorously combine and confederate together for the purpose aforesaid, and did then and there levy war against said United States. And the said Jefferson Davis, and the said Robert E. Lee, and the said other persons known as well as said other persons unknown to the grand jurors aforesaid, confederates, in pursuance of the said unlawful, false, and malicious and traitorous combination and confederation, then and there collected large armies, constituting one hundred thousand men and more, to levy and carry on war against said United States, and the said armies did then and there, in obedience to the said command of said Jefferson Davis, levy and carry on war upon and

against said United States, and that the said Jefferson Davis, then and there, to wit, on the said second day of April, did order, direct, and command said Robert E. Lee, and said other persons known as well as said other persons unknown to the grand jurors aforesaid, to assault, capture, and kill the said officers and soldiers of said military service of said United States, then being in martial array for the defense and authority of said United States, at and near the city of Petersburg, in the said district of Virginia, and within the jurisdiction of this court And the said armies so collected by the said Jefferson Davis, and by the said Robert E. Lee, and by the said other persons known as well as the said other persons unknown to the grand jurors aforesaid, in obedience to the command of said Jefferson Davis, did then and there assault, fight, wound, capture, and kill the said officers and soldiers in said military service of said United States.

"And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said second day of April, one thousand eight hundred and sixty-five, did, at the said city of Richmond, and within the jurisdiction of this court, being a person owing allegiance to said United States, contrary to his duty of allegiance, unlawfully, falsely, and maliciously and traitorously levy and carry on war against said United States as aforesaid, and did, then and there become guilty of the crime of treason against said United States, in contempt of the laws, and in violation of his duty of allegiance, and contrary to the form of the statute in such case made and provided. "And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present that the said Jefferson Davis, on the twenty-fifth day of May, in the year eighteen hundred and sixty-one, and continuous thereafter until the tenth day of May, in the year eighteen hundred and sixty-five, was a person fleeing from justice within the intent and meaning of the statute of the United States of America in such case made and provided; and that on the twenty-fifth day of May, eighteen hundred and sixty-one, there was a rebellion against the said United States, which continued for several years, to wit, until the tenth day of May, eighteen hundred and sixty-five, and that during the whole period of said rebellion by reason of the resistance to the execution of the laws of the United States, and the interruption of the ordinary course of judicial proceedings, process for the commencement of any action, civil or criminal, against the said Jefferson Davis, or for his arrest, could not be served, and the said Jefferson Davis could not, by reason of such resistance of the laws, and such interruption of such judicial proceedings be arrested, or served with process for the commencement of any action, civil or criminal, within the intent and meaning of the statute of the United States in such case made and provided.

"March 26th, 1868.

"L. H. Chandler,

Bibliography

Manuscript Collections

Thomas Francis Bayard Papers, Manuscript Division, Library of Congress, Washington, D.C.

Jeremiah Black Papers, Manuscript Division, Library of Congress, Washington, D.C.

Salmon P. Chase Papers, Manuscript Division, Library of Congress, Washington, D.C.

William Corcoran Papers, Manuscript Division, Library of Congress, Washington, D.C.

Jefferson Davis Papers, Museum of the Confederacy, Richmond, VA.

Jefferson Davis Trial Papers, Library of Virginia, Richmond, VA.

Jefferson Davis Trial Papers, University of Chicago Library, Chicago, IL.

William M. Evarts Papers, Manuscript Division, Library of Congress, Washington, D.C.

Horace Greeley Papers, New York Public Library, New York, NY.

Burton Harrison Papers, Manuscript Division, Library of Congress, Washington, D.C.

Joseph Holt Papers, Manuscript Division, Library of Congress, Washington, D.C.

Andrew Johnson Papers, Library of Congress, Washington, D.C. [microfilm edition].

James M. Mason Papers, Manuscript Division, Library of Congress, Washington, D.C.

Charles O'Conor Miscellaneous Papers, Manuscript Division, New York Public Library, New York, NY.

Charles O'Conor Miscellaneous Papers. New York Law Institute, New York, NY.

Franklin Pierce Papers, Library of Congress, Washington, D.C. [microfilm edition].

John C. Underwood Papers, Manuscript Division, Library of Congress, Washington, D.C

.

Published Primary Sources

Bates, Edward. *The Diary of Edward Bates, 1859-1866.* Edited by Howard K. Beale. Washington, D.C.: United States Government Printing Office, 1933.

Browning, Orville Hickman. *The Diary of Orville Hickman Browning*. 2 vols. Edited by James G. Randall. Springfield, Illinois: The Illinois State Historical Library, 1933.

Butler, Benjamin. *Butler's Book.* Boston: A. M. Thayer & Co., 1892.

Chase, Salmon P. *The Salmon P. Chase Papers*. Edited by John Niven. 5 vols. Kent, Ohio: The Kent State University Press, 1998.

Chipman, N. P. *The Tragedy of Andersonville: Trial of Captain Henry Wirz, The Prison Keeper*, 2nd ed. Sacramento, California: published by author, 1911.

Cox, Samuel S. *Union, Disunion, Reunion: Three Decades of Federal Legislation 1855 to 1885*. Providence: J. A. & R. A. Reid, Publishers, 1885.

Dana, Richard Henry, Jr. *The Journal of Richard Henry Dana, Jr.* 3 vols. Edited by Robert F. Lucid. Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1968.

Davis, Jefferson. *Jefferson Davis: Constitutionalist.* Edited by Dunbar Rowland. 10 vols. Jackson: Mississippi Department of Archives and History, 1923.

_____. *The Papers of Jefferson Davis*. Edited by Lynda L. Crist. 13 vols. to date. Baton Rouge: Louisiana State University Press, 1971-.

_____. *The Rise and Fall of the Confederate Government*, 2 vols. New York: D. Appleton & Company, 1881.

Davis, Varina. *A Memoir: Jefferson Davis Ex-President of the Confederate States of America*. 2 vols. New York: Belford Company, Publishers, 1890.

Douglass, Frederick. *The Frederick Douglass Papers,* Edited by John W. Blassingame and John R. McKivigan, 4 vols. New Haven: Yale University Press, 1991.

Grant, Ulysses S. *Personal Memoirs of U. S. Grant*. 2 vols. New York: Webster and Company, 1892.

Jefferson, Thomas. Edited by H. A. Washington. 9 vols. *The Writings of Thomas Jefferson.* Washington, D.C.: Taylor & Maury, 1853.

Johnson, Andrew. *The Papers of Andrew Johnson*. Edited by Paul H. Bergeron. 16 vols. Knoxville, Tennessee: The University of Tennessee Press, 1992.

Johnson, Bradley T. *Reports of Cases Decided by Chief Justice Chase in the Circuit Court of the United States for the Fourth Circuit 1865-1869*. New York: Diossy & Company, 1876, Reprint, Book Renaissance.

Lincoln, Abraham. *The Collected Works of Abraham Lincoln*. Edited by Roy P. Basler. 9 vols. New Brunswick, New Jersey: Rutgers University Press, 1953.

McCulloch, Hugh. *Men and Measures of Half a Century: Sketches and Comments*. New York: Charles Scribner's Sons, 1888.

O'Conor, Charles. My Own Cases: Lemmon's Slaves and Slavery Cases, vol. 34. "The People of the State of New York, on the relation of Louis Napoleon v. Jonathan Lemmon, A citizen of the State of Virginia." In the Court of Appeals for the State of New York. Self published.

Reagan, John H. *Memoirs: With Special References to Secession and the Civil War*. New York: The Neale Publishing Co., 1906.

Shea, George. *Jefferson Davis: A Statement Concerning the Imputed Special Causes of his Long Imprisonment by the Government of the United States, and of his Tardy Release by Due Process of Law*. London: Edward Stanford, 1877.

Sherman, William Tecumseh. *Memoirs of General W. T. Sherman*. 2 vols. New York: Appleton and Company, 1875.

_____. *Sherman's Civil War: Selected Correspondence of William T. Sherman, 1860-1865*. Edited by Brooks D. Simpson and Jean V. Berlin. Chapel Hill, North Carolina: The University of North Carolina Press, 1999.

Stephens, Alexander H. *Recollections of Alexander H. Stephens*. Edited by Myrta Lockett Avary. Baton Rouge: Louisiana State University Press, 1998.

Stevens, Thaddeus, *The Selected Papers of Thaddeus Stevens*. 2 vols. Edited by Beverly Wilson Palmer. Pittsburgh: University of Pennsylvania Press, 1998.

Strong, George Templeton. *The Diary of George Templeton Strong: Post-War Years 1865-1875*. Edited by Allan Nevins and Milton Halsey Thomas. New York: The MacMillan Company, 1952.

Sumner, Charles. *The Selected Letters of Charles Sumner.* Edited by Beverly Wilson Palmer. 2 vols. Boston: Northeastern University Press, 1990.

Webster, Daniel. *The Works of Daniel Webster.* 6 vols. Boston: Little, Brown and Company, 1853.

Welles, Gideon. *The Diary of Gideon Welles*. 3 vols. Edited by Edgar T. Welles. Boston: Houghton Mifflin Company, 1911.

Secondary Sources

Books

Blue, Frederick J. *Salmon P. Chase: A Life in Politics.* Kent: The Kent State University Press, 1987.

Bowers, Claude G. *The Tragic Era: The Revolution After Lincoln*. New York: Houghton Mifflin Company, 1929.

Brands, H. W. *The Man Who Saved the Union: Ulysses Grant in War and Peace*. New York: Doubleday, 2012.

Burgess, John W. *Reconstruction and the Constitution 1866-1876*. New York: Charles Scribner's Sons, 1905.

Burke, Edmund. "Speech of Edmund Burke, Esq., on Moving his Resolutions for Conciliation with the Colonies," in *Longman's English Classics,* edited by George Rice Carpenter, New York: Longmans Green & Co., 1896.

Burlingame, Michael. *Abraham Lincoln: A Life*. 2 vols. Baltimore, Maryland: The Johns Hopkins University Press, 2008.

Cooper, William J. *Jefferson Davis, American*. New York: Alfred A. Knopf, 2000.

Coulter, E. Merton. *A History of the South.* Vol. 8. *The South During Reconstruction 1865-1877*. Baton Rouge, Louisiana: Louisiana State University Press, 1947.

Craven, John J. *The Prison Life of Jefferson Davis*. New York: Carleton Publisher, 1866.

Crofts, Daniel W. *Old Southampton: Politics and Society in a Virginia County, 1834-1869*. Charlottesville: The University of Virginia Press, 1992.

Davis, William C. *Jefferson Davis: The Man and His Hour.* New York: Harper Collins Publishers, 1991.

Dunning, William Archibald. *The American Nation: A History*, vol. 22, *Reconstruction Political and Economic 1865-1877*. New York: Harper & Brothers, 1907.

Dyer, Brainerd. *The Public Career of William M. Evarts*. Berkeley, California: University of California Press, 1933.

Foner, Eric. *Reconstruction: America's Unfinished Revolution 1863-1877*. New York: Perennial Classics, 2002.

Forgie, George B. *Patricide in the House Divided: A Psychological Interpretation of Lincoln and His Age*. New York: W. W. Norton & Company, 1979.

Freeman, Douglas Southall. *A Calendar of Confederate Papers*. Richmond, Virginia: The Confederate Museum, 1908.

Fleming, Walter Lynwood. *The Confederacy and Reconstruction: Part 2: The Sequel of Appomattox*. New Haven, Connecticut: Yale University Press, 1919.

Gallagher, Gary W. "Another Look at the Generalship of R. E. Lee," in *R. E. Lee: The Soldier*, edited by Gary W. Gallagher, 275-289. Lincoln: University of Nebraska Press, 1996.

Hall, Kermit L., editor. *The Oxford Companion to the Supreme Court of the United States.* New York: Oxford University Press, 1992).

Harrison, Fairfax, editor. *Aris Sonis Focisque: Being a Memoir of an American Family, the Harrisons of Skimino and particularly of Jesse Burton Harrison and Burton Norvell Harrison*. The De Vinne Press, 1910. Reprinted by BiblioLife, LLC, 2013.

Hoffer, Peter Charles. *The Treason Trials of Aaron Burr*. Lawrence, Kansas: University Press of Kansas, 2008.

Jones, Jacqueline. *Saving Savannah: The City and the Civil War*. New York: Alfred A. Knopf, 2008.

Kendrick, Benjamin B., editor. The Journal of the Joint Committee of Fifteen on Reconstruction: 39th Congress, 1865-1867. New York: Columbia University, 1914.

Leonard, Elizabeth D. *Lincoln's Forgotten Ally: Judge Advocate General Joseph Holt of Kentucky*. Chapel Hill: The University of North Carolina Press, 2011.

Milton, George Fort. *The Age of Hate: Andrew Johnson and the Radicals*. New York, New York: Coward-McCann, Inc., 1930.

Neely Jr., Mark E. *The Fate of Liberty: Abraham Lincoln and Civil Liberties*. New York: Oxford University Press, 1991.

Nicolay, John G. and John Hay. *Abraham Lincoln: A History*. 10 vols. New York: The Century Company, 1890.

Niven, John. *Salmon P. Chase: A Biography*. New York: Oxford University Press, 1995.

Procter, Ben H. *Not Without Honor: The Life of John H. Reagan*. Austin: The University of Texas Press, 1962.

Ripley, C. Peter, Editor. *The Black Abolitionist Papers.* 5 vols. Chapel Hill: The University of North Carolina Press, 1992.

Robinson, William M. Jr. *Justice in Grey: A History of the Judicial System of the Confederate States of America.* Cambridge: Harvard University Press, 1941.

Speed, James. *James Speed: A Personality*. Louisville, Kentucky: Press of John P. Morton & Co., 1914.

Stewart, David O. *Impeached: The Trial of President Andrew Johnson and the Fight for Lincoln's Legacy.* New York: Simon & Schuster, 2009.

Van Deusen, Glyndon G. *Horace Greeley: Nineteenth-Century Crusader*. Philadelphia: University of Pennsylvania Press, 1953.

White, Jonathan W. *Abraham Lincoln and Treason in the Civil War: The Trials of John Merryman*. Baton Rouge, Louisiana: Louisiana State University Press, 2011.

_____. "The Trial of Jefferson Davis," in *Constitutionalism in the Approach and Aftermath of the Civil War,* edited by Paul D. Moreno and Johnathan O'Neill. New York: Fordham University Press, 2013.

Winik, Jay. *April 1865: The Month that Saved America*. New York: Harper Collins Publishers, 2001.

Witt, John Fabian. *Lincoln's Code: The Laws of War in American History*. New York: Free Press, 2012.

Articles and Pamphlets

"A Voice From Rebel Prisons: Giving an Account of Some of the Horrors of the Stockades at Andersonville, Milan, and other Prisons by a Returned Prisoner of War." Boston: Press of George C. Rand and Avery, 1865.

Chandler, Lucius H. "Speech of Hon. Lucius H. Chandler of Virginia, in the House of Representatives of the United States, in Defence of his Claim to a Seat in the Body for the Thirty-Eighth Congress." Reprinted from the Congressional Globe of May 21, 1864.

Charles O'Conor Memorials. New York: New York Law Institute, 1884.

Daly, Charles P. "Charles O'Conor: His Professional Life and Character." *Magazine of American History*, vol. XIII, no. 6. June 1885.

Dougherty, J. Hampden. "William M. Evarts, Lawyer and Statesman." *The American Lawyer: A Monthly Journal Serving the Interests of the Legal Profession in America*. New York, January 1902.

Galloway, Charles B. "Jefferson Davis: A Judicial Estimate," Bulletin of the University of Mississippi, series VI, supplement to no. 3. August, 1908.

Hanchett, William. "Reconstruction and the Rehabilitation of Jefferson Davis: Charles G. Halpine's Prison Life." *The Journal of American History* 56 (1969): 280-289.

Hill, Frederick Trevor. "Decisive Battles of the Law: The Hayes-Tilden Contest- a Political Arbitration." Harper's Monthly Magazine, March 1907.

Lathrop, George P. "The Bailing of Jefferson Davis." The Century Magazine, February, 636-644.

Nicoletti, Cynthia. "Did Secession Really Die at Appomattox?: The Strange Case of U.S. v. Jefferson Davis." *University of Toledo Law Review* 41 (2010): 587-635.

O'Conor, Charles. "Negro Slavery Not Unjust: Speech of Charles O'Conor, Esq., at the Union Meeting at the Academy of Music, New York City, December 19th, 1859." New York: Van Evrie, Horton & Co.

Phillips, Christopher. "Lincoln's Grasp of War: Hard War and the Politics of Neutrality and Slavery in the Western Border States, 1861-1862." *The Journal of the Civil War Era*, 3, no. 2 (2013): 184-210.

"Report of the Commission on the Andersonville Monument." Boston: Wright & Potter Printing Co., State Printers, 1902.

"The Chicago Copperhead Convention: The Treasonable & Revolutionary Utterances of the Men who Composed It." The Congressional Union Committee, Washington D.C., 1864.

Waugh, Joan. "I Only Knew What Was in My Mind,' Ulysses S. Grant and the Meaning of Appomattox." *The Journal of the Civil War Era*, 2, no. 3 (2012): 307-336.

Nineteenth Century Newspapers and Periodicals

Albany Evening Journal

Alexandria Gazette

Atlantic Monthly

Augusta Chronicle

Baltimore Sun

Boston Daily Advertiser

Boston Journal

Boston Post Camden

Democrat

Charleston Courier

Charleston Mercury

Chicago Legal News

Cincinnati Daily Gazette

Cleveland Leader

Commercial Advertiser

Critic-Record

Daily Advocate

Daily Age

Daily Albany Argus

Daily Constitution Union

Daily Eastern Argus

Daily Globe

Daily National Intelligencer

Daily State Gazette

Elkhart Weekly Review

Evening Post

Evening Star

Frank Leslie’s Illustrated Newspaper

Hartford Daily Courant

Jamestown Journal

Liberator

Lowell Daily Citizen and News

Macon Telegraph

Massachusetts Spy

The Nation

National Intelligencer

New-Hampshire Sentinel

New London Democrat

New Orleans Tribune

New York Bar Magazine

New York Evening Post

New York Herald

New York Herald-Tribune

New York Reformer

New York Times

New York Tribune

Norwich Aurora

People's Advocate

Philadelphia Inquirer

Plain Dealer

Portland Advertiser

Portsmouth Journal of Literature and Politics

Richmond Examiner

Richmond Whig

Salem Register

Springfield Republican

St. Albans Messenger

Weekly Eagle

Winchester Virginian

Wooster Republican

Government Publications

A Digest of Opinions of the Judge Advocate General of the Army. Edited by William Winthrop. Washington: Government Printing Office, 1880.

Congressional Globe.

Cases of Contested Elections in Congress from 1834-1865, Inclusive. House of Representatives, Misc. Doc. No. 57. 38th Congress, 2d Session. Washington: Government Printing Office, 1865.

Debates and Proceedings in the Congress of the United States; with an Appendix, containing Important States Papers and Public Documents, and all the Laws of a Public Nature; with a Copious Index. Ed. Joseph Gales. Washington: Gales and Seaton, 1834.

Documents of the Sanitary Commission, vol. II, no. 61-95. New York: Wm. C. Bryant & Co., Printers, 1863.

Executive Documents of the House of Representatives, 40th Cong., 2d sess., Ex. Doc. No. 23, Trial of Henry Wirz, (Washington, D.C.: 1867).

House of Representatives, Report No. 59. 38th Congress, 1st Session. April 25, 1864.

Impeachment Investigation: Testimony Taken Before the Judiciary Committee of the House of Representatives in the Investigation of the Charges Against Andrew Johnson. Second Session Thirty-Ninth Congress, and First Session Fortieth Congress. Washington: Government Printing Office, 1867.

Journal of the Proceedings of the Senate of the United States in Executive Session. Thirty-seventh Congress, second session. December 1861.

Journal of the Proceedings of the Senate of the United States in Executive Session. Thirty-eighth Congress, first session. June 1864.

Narrative of Privations and Sufferings of United States Officers and Soldiers While Prisoners of War in the Hands of the Rebel Authorities. Philadelphia, Pennsylvania: Printed for the U. S. Sanitary Commission, King & Baird, Printers, 1864.

Official Opinions of the Attorneys General of the United States. Edited by J. Hubley Ashton. Washington, D.C.: W. H. & O. H. Morrison, 1870.

"Opinion on the Constitutional Power of the Military to Try and Execute the Assassins of the President." James Speed, Attorney General (Washington: Government Printing Office, 1865).

Report of the Joint Committee on Reconstruction. Washington, D.C.: Government Printing Office, 1866.

Reports of Committees of the House of Representatives made during the Second Session of the Thirty-Seventh Congress, 1861-1862, "Loyalty of Clerks and other Persons Employed by Government, January 28, 1862." Washington D.C.: Government Printing Office, 1862.

Trial of Andrew Johnson, President of the United States, Before the Senate of the United States, on Impeachment by the House of Representatives for High Crimes and Misdemeanors. 3 vols. Washington: Government Printing Office, 1868.

United States Census Records, 1860.

War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies, 128 vols. Washington, D.C.: Government Printing Office, 1880-1901.

Constitution, Statutes and Case Law

United States Constitution.

The Public Statutes at Large of the United States of America. April 30, 1790.

The Statutes at Large, vol. XII. Boston, Massachusetts: Little, Brown & Co., 1865.

Ex Parte Milligan, 71 U.S. 2, 18 L.Ed. 281, 4 Wall. 2 (1866).

Cramer v. United States, 325 U.S. 1; 65 S.Ct. 918; 89 L.Ed. 1441 (1945).

Vita

Robert Eugene Icenhauer-Ramirez was born in Laredo, Texas and lived in Hebbronville, Texas until he graduated from high school. In September 1973, he entered Texas A&M University in College Station and graduated with a B.A. in May 1976. In 1976 he entered the University of Texas at Austin Law School and graduated with a J.D. in May 1979. He went to work for the City of Port Arthur, Texas as an Assistant City Attorney before moving back to Austin to work for the City of Austin in the same capacity. In 1985, he went into private practice, where he has maintained a law practice since that time. He is a trial lawyer and has tried dozens of cases to a jury, including death penalty and other murder cases. He also frequently appears in federal court representing police officers against claims of excessive use of force. For the past 19 years, he has been an AV Rated lawyer by Martindale-Hubbell, reflecting the highest possible peer review rating in legal ability and ethical standards. In September 2006, he returned to the University of Texas at Austin to begin work on his Master of Arts in history, which he earned in May 2009. He is currently a member of the Visiting Committee for the University of Texas at Austin History Department.

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